STATE OF NEW JERSEY

REPORT OF

CORPORATION LAW REVISION COMMISSION

and

COMMISSIONERS' COMMENTS

to

PROPOSED REVISION
of the

GENERAL CORPORATION LAW

of

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(SENATE, No. 884)

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June 20, 1968

CORPORATION LAW REVISION COMMISSION

ALAN V. LOWENSTEIN
Chairman

DONALD B. KIPP

JAMES A. HESSION

REPORT OF THE CORPORATION LAW REVISION COMMISSION

June 20, 1968.

To the Governor and the Members of the New Jersey Legislature:

Ninety-three years after New Jersey adopted the first modern business corporation law in the United States, the Commission is pleased to submit the first comprehensive revision of this legislation in light of current business needs and corporate practices.

Created by chapter 10 of the Laws of 1958, the Commission was charged with the duty

> "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."

The Commission at all times kept this mandate in the forefront of its deliberations.

Sources

In order to enable the Commission to embody in the Revision "principles and procedures representing the best in modern American Law applicable to business corporations," it has studied and analyzed not only the statutes of the states of the United States, but also in some instances those of Canada and the United Kingdom. Since the 1940's, most states have revised their corporation statutes, often after considerable study and debate by commissions and bar association committees.

Close attention has also been paid by the Commission 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. Many of the provisions of the Model Act have been adopted, in spirit if not in letter. Ideas and language were also borrowed from the statutes of such leaders

of corporate law as Delaware, New York and Illinois to mention but three. Text writers and authors of law review articles in recent years have also been consulted.

Great weight, of course, has also been given to the existing statute law in New Jersey, largely contained in Title 14 of the Revised Statutes, and to the large body of case law in this state, much of which has proved to be sound. However, the changes in form and substance embodied in the Revision are so comprehensive that to a large extent the Revision must be viewed as new legislation.

To aid the Legislature, the courts and the bar of this state in comprehending the Revision, the Commission also submits with this Report section by section comments, indicating the legislative sources or references, with particular emphasis on prior New Jersey Statutes and the Model Act, and citing New Jersey cases and other source materials. It is hoped that the Commission's comments will prove a useful tool in statutory construction.

New Law as Inducement to New Jersey Incorporation

Since 1791, when Alexander Hamilton turned to New Jersey for the incorporation of his Society for the Promotion of Useful Manufactures, the first manufacturing company in the United States, New Jersey has sought to offer a favorable business climate for the incorporation of business enterprises.

In the post-Civil War period, the corporation came of age and became the organizational instrument for building a continent. Compulsory general incorporation laws were enacted in the 1870's, led by New Jersey's statute of 1875. This law offered few restrictions on powers or size, and permitted conveniently flexible financial management. Despite the efforts of New York and other states to stem the tide to New Jersey, by 1904 the seven largest business corporations, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law.

Since World War I, however, it is clear that the trend has been steadily toward Delaware incorporation as New Jersey has fallen farther behind in modernizing its corporation act to meet current needs and practices. The Commission trusts that this trend will now be reversed, in light of the Revision of the New Jersey corporation laws herewith submitted.

New Law Enabling, Not Restrictive

The modern corporation's business is frequently national or international in scope; its state of incorporation is largely incidental. Recognizing this fact, and seeking to attract corporations to establish their domiciles within their borders, most states in recent decades have been increasingly flexible and permissive in revising their corporation laws.

Pursuing this policy perhaps further than any other state, the Commission believes it is following sound public policy for New Jersey. It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts. Whether it be anti-trust or securities regulation; wage and hour or social security laws; bankruptcy or corporate reorganization statutes; or even controls over personal practices provided in the Internal Revenue Code or controls over the methods of marketing and advertising products, provided both by statutes and by administrative agencies, the means of assuring such protections must be provided by the Federal Government. Any attempt to provide such regulations in the public interest through state incorporation acts and similar legislation would only drive corporations out of the state to more hospitable jurisdictions.

The primary functions of a state corporation law, the Commission believes, are to provide a flexible framework for private rights; to eliminate any straight-jacket on the fulfillment of programs of honest management; to provide adequate protection for shareholders, including those with minority interests; and to give full recognition to the rights of creditors. It is hoped that the Revision accomplishes these aims.

A flexible, enabling statute offers an increased opportunity for creative corporate planning to the draftsman of corporate documents. He may now, with few restrictions, provide precisely the corporate structure which most nearly fulfills his client's needs. A flexible, enabling law also offers greater scope for equity jurisprudence. The fact that management may exercise broader powers, if granted by the certificate of incorporation, or may act by simpler procedures does not mean that actions may be taken to the detriment of minority interests or creditors. Presumably recourse will be had to the courts when there is an abuse of corporate power.

New Law Advantageous to Large and Small Corporations

Whether it be in changes of voting rights, improved protection by way of indemnification of directors, simplified merger provisions, enlarged authorization for the issuance of stock in series, or countless other ways, the Revision offers the publicly held corporation the most modern corporation law in the United States.

The Commission gave equal consideration to the needs of the close corporation—the incorporated partnership or proprietorship. After much study and review, the Commission determined, as have its counterparts in most states, that it was not desirable to have a separate law govern the close corporation, as distinct from all other corporations generally. Nevertheless numerous sections of the Revision are intended primarily for the benefit of the close corporation. Corporate procedures have been simplified; provisions heretofore contained in stockholders' agreements may now be included in the corporate charter; and management and control provisions may now be provided for directly, without concern that they are inconsistent with the corporate structure.

The close corporation has come out of its straight-jacket; the publicly held corporation has lost the impediments provided by an out-moded law.

Principal Changes Provided by New Law

It is not feasible to summarize all of the significant changes made in a comprehensive revision consisting of 195 sections divided into 16 chapters. Title 14 of our present law contains over 200 sections, of which 34 have been omitted in the Revision, 7 saved from repeal, and the balance incorporated in some form in the proposed Revision.

A summary of some of the more significant changes or additions follows:

Chapter 1. General Provisions

Section 14A:1–6 is noteworthy because it streamlines procedures in the execution and filing of documents and, unlike present law, provides for delayed effective dates where specified.

Chapter 2. Formation

Sections 14A:2–3 and 4 introduced new provisions allowing the reservation of a corporate name for 120 days and the annual registration in New Jersey of the name of a foreign corporation, thereby protecting the use of the name without formal qualification in this state.

Section 14A:2–6 allows one or more persons, including a domestic or foreign corporation, to organize a corporation, and eliminates the necessity of a meeting of incorporators.

Section 14A:2–7 authorizes the creation of an all-purpose corporation, eliminating the traditional practice of lengthy recitals of corporate purposes in the certificate of incorporation. The requirement that the certificate of incorporation be filed with the County Clerk has been omitted.

Chapter 3. Powers

Section 14A:3–1 enumerates the powers of each domestic corporation. It is self-executing. Among such powers is provision for participation in partnerships and joint ventures.

Section 14A:3–2, which has no counterpart in Title 14, follows the Model Act and precludes the defense of *ultra vires* by the parties to a contract, regardless 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 for rescission.

Section 14A:3–3, which also has no counterpart in present law, permits a corporation to give a guaranty not in furtherance of its corporate purposes, but only when authorized by a two-thirds vote of shareholders.

Section 14A:3–5 enlarges upon the indemnification provisions for directors, officers and employees, consistent with recent enactments in other states, and includes a new provision authorizing corporations to provide insurance for corporate agents against a broad range of expenses and liabilities.

Chapter 4. Registered Office and Registered Agent; Annual Report

Section 14A:4–5 reduces to a minimum the data required in the annual report, and specifies that it shall be filed on forms furnished by the Secretary of State.

Chapter 5. Shareholders' Meetings and Elections

Section 14A:5–8 omits the requirement of present law that stock and transfer books be produced at a shareholders' meeting. The voting list to be produced at each meeting need not be available for inspection during a ten day prior period, as presently required. Section 14A:5–28 eliminates the need for this requirement.

Section 14A:5–9 eliminates present law specifying that a quorum may not be more than a majority. It also fails to specify a "floor," as does the Model Act and New York law. This flexibility should be helpful to both large and small corporations.

Sections 14A:5–12 contains a substantial change respecting voting rights of shareholders. Unless the certificate of incorporation or a specific section of the Revision otherwise provide, a majority vote governs. But the certificate of incorporation, as in the case of a close corporation, may provide greater voting requirements.

Section 14A:5–20 permits voting trusts to continue for 21 years, and they may be renewed for an additional 21 years. Present law in New Jersey and most states limits voting trust to 10 year terms.

Section 14A:5–21 authorizes stock pooling agreements and provides that the certificate of incorporation of a close corporation may contain management provisions which today might be deemed invalid as improperly restricting the discretion of the board of directors. This section will be of particular utility to the close corporations of this state.

Section 14A:5–29 eliminates pre-emptive rights in newly organized corporations, unless provided for in the certificate of incorporation. The pre-emptive rights of shareholders of existing corporations are preserved, unless removed by two-thirds vote.

Chapter 6. Directors and Officers

Section 14A:6–1 departs from present law by providing that directors need not be shareholders.

Section 14A:6–2 fixes the minimum number of directors at three except that where there are only one or two shareholders, the number need not exceed the number of shareholders.

Section 14A:6–7(2) permits directors to act unanimously without a meeting by filing written consents before or after the action.

Chapter 7. Shares and Dividends

This Chapter incorporates the most modern concepts of corporate accounting and financing. It makes numerous changes from present law. For details, reference should be made to the section by section comments of the Commission, since the complexity of the subject matter does not lend itself readily to synopsis or brief comment. This Chapter is infinitely more detailed and complete than present New Jersey law.

Chapter 8. Beneficial Provisions for Employees

This Chapter provides, it is believed, a clarification and simplification of Chapter 9 of Title 14.

Chapter 9. Amendments

Section 14A:9–2(4) requires approval of a charter amendment by a majority of votes cast by the shareholders entitled to vote on the amendment, rather than by a two-thirds vote of all shareholders entitled to vote on such amendment as presently provided. In the case of existing corporations which have not adopted the new voting requirement, a two-thirds vote of all shares cast at a meeting shall be required. The certificate of incorporation, however, may require a greater voting requirement under Section 14A:5–12.

Chapter 10. Merger, Consolidation, Acquisition of All Capital Shares of a Corporation and Sale of Assets

Merger procedures have been modernized and simplified by Chapter 10. Special provisions are made for subsidiary mergers, upstream as well as downstream.

Provisions for bulk sales of assets have also been liberalized. Here again, approval by a majority of the votes cast by the shareholders entitled to vote on such sale has been substituted for the vote of two-thirds in interest of such shareholders. Section 14A:10–11(1)(c). Existing corporations, however, will retain a two-thirds voting requirement until changed by amendment to its certificate of incorporation.

Chapter 11. Rights of Dissenting Shareholders

Chapter 11 of the Revision rewrites the laws governing the rights of shareholders who dissent from mergers and bulk sales of assets. Procedures have been simplified and the types of transactions from which a shareholder may dissent have been narrowed. The concept of "fair value" has been substituted for "fair market value" as the basis for valuation of the dissenter's shares.

Chapter 12. Dissolution

Chapter 12 modernizes the provisions of Chapter 13 of Title 14, and permits dissolution of corporations organized hereafter by majority vote of shareholders, voting by classes of holders of voting stock, rather than by vote of "two-thirds in interest of all the stockholders whether with or without voting powers and without regard to class." Section 14A:12–4.

Section 14A:12–5 adds a new provision, useful to close corporations, permitting the inclusion in the certificate of incorporation of a provision for dissolution by action of any one or more shareholders specified.

Section 14A:12–7 simplifies an action for dissolution when deadlock occurs.

Chapter 13. Foreign Corporations

Chapter 13 is intended to clarify present law regarding the admission and withdrawal of foreign corporations doing business in New Jersey.

Chapter 14. Insolvency, Receivers and Reorganization

Chapter 14 represents a substantial departure from Chapter 14 of Title 14 and has been drawn to conform more closely to the provisions of the Bankruptcy Act. The definition of insolvency has been enlarged to include both equity and bankruptcy standards. Section 14:14–2 of Title 14 has been omitted, but provisions comparable to the Bankruptcy Act have been included relating to fraudulent transfers and preferences. See Sections 14A:14–10 to 14A:14–14, inclusive.

Chapter 15. Fees of Secretary of State

The most noteworthy change in Chapter 15 is the substitution of a fee of one cent per share, for both par and no par shares, up to 10,000 shares and one-tenth of one cent for the excess, upon authorization of new shares of stock, instead of the present fee schedule. A minimum fee of $10 and a maximum fee of $1,000 are also provided. No longer will there be a difference between par and no par shares, or a disadvantage compared with fees charged by other states.

Commission's Procedure and Personnel

In the decade of its work, the Commission has held 176 formal meetings, most attended by all members of the Commission, its Secretary, and one or more consultants. From time to time it has had the benefit of memoranda and correspondence from members of the bar, and occasionally has held meetings with attorneys and state officials. The Commissioners worked independently between meetings, submitting the results of their efforts for consideration at meetings of the full Commission. Minutes of the Commission's meetings will be filed in the State Library.

The work of the Commission was unfortunately interrupted by the illness and untimely death of its original Chairman, Edward J. O'Mara, who made a most significant contribution to the Commission's work in the relatively short time alloted to him. He was succeeded on the Commission by James A. Hession, its original Secretary.

The Commission gratefully acknowledges the valuable contributions to its total effort made by its Secretary, Donald G. Marshall, now Professor of Law at the University of Minnesota Law School, and by its consultants, Sidney L. Posel, Professor of Law at the Rutgers University School of Law, Israel Spicer, Harry J. Wallum, Jr. and John R. MacKay II.

In Ocober, 1967 the Commission issued a Preliminary Draft of the proposed Revision, with section by section comments for distribution to a limited number of attorneys of New Jersey and other states in order to draw constructive suggestions and criticisms. The Commission wishes to express its appreciation to the many lawyers who, individually or as members of review committees, gave the Commission the benefit of their views and anal-

yses. The vast majority of their recommendations were adopted by the Commission.

On its own, the Commission made further changes in the Preliminary Draft and omitted some provisions because they were surplusage. The Commission sees no benefit in referring to the Preliminary Draft and Comments in future statutory construction.

Conclusion

The Commission fully recognizes that no statute of the dimensions of the Revision can be perfect, and that the process of revision could proceed for many more months, perhaps with advantage to the state. In the light of the years that have already been expended and the need for prompt action, we urge the enactment of the Revision to take effect January 1, 1969.

During 1969 proposals for amendment can be gathered, based on experience and increased study, with a view to incorporating all desirable amendments in a single enactment in 1970. It is important that piece-meal legislation not create ambiguities or otherwise impair a fully integrated statute.

Respectfully submitted,

ALAN V. LOWENSTEIN, CHAIRMAN
DONALD B. KIPP
JAMES A. HESSION

14A:1–1

SHORT TITLE; PURPOSES; RULES OF CONSTRUCTION; VARIATION.

SOURCE OR REFERENCE

N. J.: N. J. S. § 12A:1–102

Model Act: § 1

Other: Conn. S. C. A. § 2; Supp. § 33–283

COMMENT

Subsection 14A:1–1(1) is based on section 1 of the Model Act.

Subsections 14A:1–1(2) and 14A:1–1(3) have no counterparts in the Model Act or in Title 14. Subsection 14A:1–1(2) is derived from N. J. S. 12A:1–102(1), while the form of subsection 14A:1–1(3) and the text of paragraph (a) thereof are based on N. J. S. 12A:1–102 and paragraph (a) of that section. The Commission was not content to count always on the liberality and breadth of view revealed in cases such as *A. P. Smith Mfg. Co.* v. *Barlow,* 13 N. J. 145 (1953) and *Brundage* v. *The New Jersey Zinc Co.,* 48 N. J. 450 (1967). Accordingly, in subsections 14A:1–1(2) and 14A:1–1(3), the Commission explicitly required a liberal construction and application of this Revision to promote its underlying purposes and policies. The corporation laws of this State have been liberally construed on a number of occasions, as in the cited cases, and have been characterized by the New Jersey courts as being liberal corporation laws, offering a favorable corporate climate. See, e. g., *State by Van Riper* v. *American Sugar Refining Co.,* 20 N. J. 286, 296 (1956); *State* v. *Jefferson Lake Sulphur Co.,* 36 N. J. 577, 588 (1962); *Jackson* v. *Diamond T. Trucking Co.,* 100 N. J. Super. 186, 198 (Law Div., 1968). Subsections 14A:1–1(2) and 14A:1–1(3) represent a rule of construction codifying the foregoing liberal policy, deemed an essential feature of modern corporate law. As to construction of this Revision, see, also, section 14A:16–1.

Paragraph 14A:1–1(3) (b) is based on Conn. S. C. A. § 2; Supp. § 33–283. Through it, the Commission sought to confine the instances in which our courts might otherwise declare departures

from the general corporate form illegal as being obnoxious to public policy. In the view of the Commission, *Jackson* v. *Hooper,* 76 N. J. Eq. 592 (E. & A. 1910) should not be a leading case under this Revision. Much is left to the courts by paragraph 14A:1–1(3) (b) and the Commission hopes that the courts will utilize this provision to tip the balance in a close case, whether the particular corporation is large or small, publicly or closely held.

Paragraph 14A:1–1(3) (c) is original. It has no counterpart in the Model Act or in Title 14. The term "close corporation" is not a defined term in this Revision, but it is no stranger to the New Jersey courts. *Whitfield* v. *Kern,* 122 N. J. Eq. 332, 336 (E. & A. 1937); *Katcher* v. *Ohsman,* 26 N. J. Super. 28, 32 (Ch. Div., 1953). The Commission elected not to have a separate law govern the close corporation, as distinct from all other corporations generally. Throughout this Revision are a number of provisions of particular interest to the parties interested in a close corporation, not all of which are entirely new. Those provisions are discussed in the Comments to the sections of this Revision where they appear.

Subsection 14A:1–1(4) complements subsections (2) and (3) of this section. It has no counterpart in the Model Act or in Title 14, and is derived from N. J. S. 12A:1–102(4) and Conn. S. C. A. § 2; Supp. § 33–283.

14A:1–2

DEFINITIONS

SOURCE OR REFERENCE

N. J.: R. S. 14:1–1; 14:4–1

Model Act: § 2

Other: As noted in the Comment

COMMENT

This section contains definitions of certain terms. It is based on section 2 of the Model Act, with changes therefrom in a number of instances, as indicated below. The Commission also borrowed liberally from definitions in the New York Act (N. Y. Bus. Corp. Law § 102(a)). Certain sections of this Revision contain their own particular definitions for the purposes of those sections. See, e. g., subsections 14A:3–5(1); 14A:8–1(2); 14A:10–9(6); 14A:11–3(1). Also, Chapter 14 of this Revision has its own definitions for purposes of that Chapter. See section 14A:14–1.

The following are comments with respect to the definitions in this section 14A:1–2.

Par. (a)—"Attorney General"

This term is not defined in the Model Act.

Par. (b)—"Authorized shares"

This definition is based on 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 for the payment of money" adapted from R. S. 14:8–5.

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(s)). 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 virtually 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. The term "close corporation" is not a defined term under this Revision. It appears only in paragraph 14A:1–1(3) (c). See the Comment to section 14A:1–1.

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)), 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 to that appearing in section 2(b) of the Model Act. Under this definition, a corporation formed by or under the laws of the United States is a foreign corporation. See, also, subsection 14A:1–3(6).

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.

Par. (l)—"Net assets"

This definition substantially adopts the definition in the New York Act (N. Y. Bus. Corp. Law § 102(a) (9)). The provision that treasury shares are not assets is taken from 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 paragraph 14A:1–2(p) (ii).

Par. (q)—"Subscriber"

This definition is identical to the one appearing in section 2(e) of the Model Act.

Par. (r)—"Subsidiary"

This definition does not appear in the Model Act. It is adapted from Ohio Rev. Code Ann. § 1701.01 (P).

Par. (s)—*"Surplus"*

This definition is identical to the one appearing in section 2(k) of the Model Act.

Par. (t)—"Treasury shares"

This definition is similar to that in the New York Act (N. Y. Bus. Corp. Law § 102(a) (14)). The provision in the New York Act that treasury shares are not assets is included in paragraph 14A:1–2(*l*) as part of the definition of "net assets". Also, the New York definition does not contain an equivalent to paragraph 14A:1–2(t) (ii), although the same result follows under the New York Act (N. Y. Bus. Corp. Law § 511(b)).

14A:1-3

Application of Act

Source or Reference

N. J.: R. S. 14:1–2; 14:1–6; 14:2–8; 14:3–3; 14:15–2
Model Act: §§ 140; 141
Other: N. Y. Bus. Corp. Law § 103(b)

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 purposes 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 (C. 17:9A–338).

For the effect of subsection 14A:1–3(5), see the Comment to section 14A:13–2. Subsection 14A:1–3(6) has no counterpart in Title 14, with the possible exception of R. S. 14:15–2. It goes beyond section 141 of the Model Act and is derived from N. Y. Bus. Corp. Law § 103(b). Subsection 14A:1–3(6) necessarily affirms the doctrine of federal supremacy in the defined fields without precluding any application of this Revision to foreign and interstate commerce and to foreign corporations which is within the reach of this State.

14A:1–4

Reorganization Under This Act by Certain Corporations Organized Under Special Acts.

Source or Reference

N. J.: R. S. 14:2–6

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. It has no counterpart in the Model Act. This 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, 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 Revision. See subsection 14A:1–3(3).

Reservation of Power

N. J.: 1947 Const., Art. IV, Sec. VII, par. 9; R. S. 14:2–9

Model Act: § 142

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).

14A:1–6

Execution, Filing and Recording of Documents

Source or Reference

N. J.: R. S. 14:1–3; 14:1–4; 14:13–1

Model Act: None

Other: Conn. S. C. A. § 4; Supp. § 33–285
Cal. Corporations Code, § 125

Comment

The trend in the most recently revised corporation statutes of other jurisdictions is to include a section such as section 14A:1–6 setting forth uniform provisions relating to the form and execution of certificates or other documents which are to be filed under the particular statute. The presence of this general section eliminates repetition of its provisions throughout the rest of this Revision. There is no counterpart in the Model Act or in Title 14.

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 Conn. S. C. A. § 4, Supp. § 33–285, 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.

As to fees payable on filing documents, see Chapter 15.

A document may in fact be filed in the office of the Secretary of State as provided in paragraph 14A:1–6(1) (b) and, yet, under paragraph 14A:1–6(1) (c), if the practitioner so desires, the transaction in connection with which the document has been filed may not become effective in certain cases for up to 30 days after the date of filing. As to the instances in this Revision which expressly authorize such procedure, see subsection 14A:2–7(2) (Certificate of Incorporation); subsection 14A:4–3(3) (Change of

Registered Office or Registered Agent); 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). The only counterpart in Title 14 is in R. S. 14:13–1, which authorizes a delayed effective date of a certificate of dissolution.

Subsection 14A:1–6(3) is a transition provision, basically intended to validate filings in the office of the Secretary of State on and after the effective date of this Revision with respect to transactions occurring before such effective date. The effective date of this Revision is January 1, 1969. See section 14A:16–4. Subsection 14A:1–6(3) is derived from California Corporations Code, § 125. There is no counterpart in the Model Act or in Title 14.

Subsection 14A:1–6(4) continues the present requirement in R. S. 14:1–4 as to the recording by the Secretary of State of all documents filed in his office relating to corporations, except annual reports. In this connection, see, also, R. S. 47:1–5 and 47:3–26.

14A:1–7

Repeal of Prior Acts

Source or Reference

N. J.: R. S. 1:1–18; 14:1–6

Model Act: § 143

Other: N. Y. Bus. Corp. Law § 103(c)

Comment

Section 14A:1–7 is derived from N. Y. Bus. Corp. Law § 103(c). Its nearest equivalent in the Model Act is section 143. Section 14A:1–7 is comparable to R. S. 14:1–6, which saves corporations organized under the corporation acts of 1875 and 1896. Section 14A:1–7 in effect saves corporations organized under Title 14. Such corporations, their officers, directors and shareholders are placed on a par with corporations organized under this Revision, their officers, directors and shareholders.

See, also, section 14A:16–3, repealing Title 14 of the Revised Statutes, section 14A:16–4 fixing January 1, 1969, as the effective date of this Revision, and subsection 14A:16–1(3), saving vested rights and certain remedies under Title 14.

NOTICES

SOURCE OR REFERENCE

N. J.:	R. S. 1:1–2.5; R. R. 1:27
Model Act:	§ 27
Other:	Conn. S. C. A. § 132; Supp. § 33–414 Ohio Rev. Code Ann. § 1701.02.

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

Source or Reference

N. J.: R. S. 14:2–4; 14:3–8; 14:11–2; 14:12–3; 14:14–41; 47:1A–1 et seq.

Model Act: § 134

Other: None.

Comment

This section is based on section 134 of the Model Act. The Commission omitted so much of Model Act § 134 as pertained to the certificates and certified copies issued by the Secretary of State being taken as *prima facie* evidence. This matter is covered by Evidence Rules 68 and 69.

R. S. 47:1A–1 et seq., "The Right to Know Law", covers much the same ground as this section. As to fees of the Secretary of State for furnishing certificates and certified copies, see section 14A:15–3 and N. J. S. 22A:4–1.

Sections in Title 14 containing provisions comparable to section 14A:1–9 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.

14A:2-1

Purposes

N. J.: R. S. 14:2–1; 14:2–2; 14:3–4.

Model Act: § 3

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.

As to setting forth the corporate purposes in the certificate of incorporation of a corporation organized under this Revision, see paragraph 14A:2–7(1) (b), which authorizes the formation of an all-purpose corporation, and see the Comment to section 14A:2–7.

Corporate Name of Domestic or Foreign Corporations

Source or Reference

N. J.: R. S. 14:2–3a; 14:11–15; 14:13–7.2; 14:13–7.3

Model Act: §§ 7; 101

Other: N. Y. Bus. Corp. Law §§ 301(a) (2) and (3); 302(b) (1) and (2); S. C. BCA § 3.1(d).

Comment

Paragraphs 14A:2–2(1) (a) and (1) (b) are largely based on clauses (b) and (c) of sections 7 and 101 of the Model Act, as amended in 1967, which relate to the corporate names of domestic corporations and foreign corporations, respectively. As to the Model Act changes, see *Blackstone, Permitting Qualification of Corporations Under Similar Names: A Change In The Model Business Corporation Act,* 23 The Business Lawyer 885 (1968). 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). 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 Revision. 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), authorizing the use of the

same or a confusingly similar name upon the filing of a proper written consent thereto or the judgment of a court is taken from section 7(c) of the Model Act, as amended. The written consent aspect of paragraph 14A:2–2(1) (b) and of subsection 14A:2–2(3) codifies a practice of the Secretary of State which is without legislative sanction at present.

Paragraph 14A:2–2(1) (c) is based on section 301(a) (3) of the New York Act. It has no equivalent in the Model Act.

Paragraph 14A:2–2(2) (a) has no counterpart in the Model Act. Its first sentence follows a similiar provision in section 302(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. Paragraph 14A:2–2(2) (b) is also taken from New York Bus. Corp. Law § 302(b) (2). Section 7 of the Model Act was amended in 1967 to add a similar provision. The Model Act amendment of section 101 in 1967 is the source of paragraph 14A:2–2(2) (c). There is no equivalent in Title 14 to paragraphs 14A:2–2(2) (b) and (2) (c).

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 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 S. C. BCA § 3.1(d). 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).

Reserved Name

Source or Reference

N. J.: None

Model Act: § 8

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 of 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 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
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 paragraph 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
Other: None

Comment

See Comment to section 14A:2–4 (Registered Name).

Incorporators

Source or Reference

N. J.: R. S. 14:2–1; 14:2–3; 14:2–4; 14:2–7; 14:10–1

Model Act: § 47

Other: N. Y. Bus. Corp. Law § 615(c)

Comment

Subsection 14A:2–6(1) follows R. S. 14:2–1 as amended by P. L. 1968, chapter 263, authorizing a single incorporator. 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 expressely 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.

Certificate of Incorporation

Source or Reference

N. J.: R. S. 14:2–3; 14:2–4

Model Act: §§ 48; 49; 50

Other: Wis. BCL § 180.45(1) (c)
N. Y. Bus. Corp. Law § 402(a) (9) and (b)
Fla. Stat. Ann., § 608.04; L. 1963, c. 357

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 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(3), 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 members constituting the first board of directors and their names. This is a departure from present law. Unlike Title 14, under the Revision it is the first board which organizes the corporation, rather than the incorporators. See section 14A:2–8, and for the limited role of incorporators see the Comment to section 14A:2–6. Thereafter, subject to certain limitations, the number of directors constituting the board is specified by the by-laws. See section 14A4:6–2.

Unlike section 48(b) of the Model Act, paragraph 14A:2–7(1) (j) 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) (j) 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 on the date of filing with the Secretary of State unless a later time, not to exceed 30 days from the date of filing is specified in the certificate pursuant to paragraph 14A:2–7(1) (k) and subsection 14A:2–7(2). 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. § 608.04; L. 1963, c. 357), and should be a decided con-

venience in those transactions where it is important that the corporate existence begin at a particular time. There are a number of sections of this Revision which authorize delayed effective 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); 2 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

Model Act: § 52

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) (h) the certificate of incorporation must set forth the number of directors constituting the first board, and their names and addresses. 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).

Subsection 14A:6–7(2) authorizes action by the board without a meeting and upon written consent, unless otherwise provided by the certificate of incorporation or by-laws. Since the board adopts the initial by-laws of the corporation at its organization meeting under subsection 14A:2–9(1), the directors by written consent may act without a meeting to effect the organization of the corporation, unless the certfiicate of incorporation otherwise provides.

14A:2–9

By-laws; Making and Altering

Source or Reference

N. J.: R. S. 14:3–2

Model Act: § 25

Other: Conn. S.C.A. §25; Supp. § 33–306(b)
Va. S.C.A. § 13.1–24

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 this Revision, see the Comment to section 14A:2–6. Subsection 14A:2–9(2) is of significance in relation to various sections of this 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)

(the certificate of incorporation or a by-law adopted by the shareholders may authorize the board to fill any newly created directorship); subsection 14A:6–6(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); section 14A:6–11 (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).

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 such provision. Compare *Gow* v. *Consolidated Coppermines Corp.*, 165 Atl. 136 (Del. Ch. 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(3).

14A:2–10

By-laws and Other Powers in Emergency

Source or Reference

N. J.: None

Model Act: § 25A

Other: None

Comment

This section is identical to 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 The Business Lawyer 249 (1962). Comparable legislation in the field of State Government was enacted in New Jersey in 1963. See the "Emergency Interim Executive Succession Act", P. L. 1963, c. 117 (C. 52:14A–1 et seq.) See, also, P. L. 1963, c. 118 (C. 52:1–1.1 et seq.)

General Powers

Source or Reference

N.J.: R. S. 14:3–1; 14:3–3; P. L. 1968, c. 262 (C. 14:3–18)

Model Act: §§ 4, 48

Other: N. Y. Bus. Corp. Law § 202; S. C. Code Ann. § 12–12.2(a) (20); Del. Code. Ann. tit. 8, § 122(11)

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). Except in paragraph 14A:3–1(1) (o), there is no provision expressly limiting the exercise of general powers to the corporate purposes. In this connection, see paragraph 14A:2–7(b), which sanctions the creation of an all-purpose corporation; section 14A:3–2, which materially abrogates the doctrine of *ultra vires*; and section 14A:3–3, which authorizes a corporation to give a guaranty not in furtherance of its corporate purposes upon certain shareholder approval.

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) (b) is taken from N. Y. Bus. Corp. Law § 202(a) (2) and 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 matters of section 4(m) of the Model

Act, relating to the power to make charitable donations, and section 4A 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.*

Paragraph 14A:3–1(1) (m) is based on P. L. 1968, chapter 262 (C. 14:3–18). The provision respecting participation in a joint venture is intended as declaratory of the common law.

Ultra Vires Transactions

Source or Reference

N. J.: None
Model Act: § 6
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).

14A:3–3

Guaranty Not In Furtherance of Corporate Purposes

Source or Reference

N. J.: None

Model Act: None

Others N. Y. Bus. Corp. Law § 908

Comment

This section is based upon 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 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 the transaction would be adjudicated to be not in furtherance of the corporate purposes.

Contributions by Corporations

Source or Reference

N. J.: 14:3–13, P. L. 1950, c. 220, (C. 14:3–13.1, 14:3–13.2, 14:13–13.3, 14:13–13.4)

Model Act: § 4(m)

Other: N. Y. Bus. Corp. Law § 202(a) (12).

Comment

This section is substantially identical to C. 14:3–13.2 and 14:3–13.3, except that the Commission deleted the 5% proviso of 14:3–13.2. Both of these sections 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 C. 14:3–13; 14:3–13.1 and 14:3–13.4 in this Revision.

Under section (4m) 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 10% limitation incorporated in C. 14:3–13.2.

14A:3–5

Indemnification of Directors, Officers and Employees

Source or Reference

N. J.: R. S. 14:3–14

Model Act: § 4A

Other: Del. Code Ann. tit. 8, § 145 (rev. 1967); N. Y. Bus. Corp. Law §§ 721 to 726

Comment

Section 14A:3–5 is derived from section 4A of the Model Act. It differs significantly from R. S. 14:3–14.

Subsection 14A:3–5(1) defines certain terms which are employed extensively throughout this section. Through the definition of "corporate agent" in paragraph 14A:3–5(1) (a), this section permits indemnification of any person who "is or was" a director, officer, trustee, employee, or agent and not merely "a present and future director, trustee or officer" as does R. S. 14:3–14. Also, indemnification is expressly extended to employees which is not the case under R. S. 14:3–14. By specific reference to "trustee" and "agent" in the definition of "corporate agent", paragraph 14A:3–5(1) (a) is more explicit than the Model Act.

The terms "civil" and "criminal" in paragraph 14A:3–5(1) (e) will prevent the result reached in *Schwarz* v. *General Aniline & Film Corp.*, 305 N. Y. 395, 113 N. E. 2d 433 (Ct. Apps. 1953), where it was held that a New York indemnification statute was not intended to apply to criminal proceedings. Subsection 723(a) of the New York Act now includes similar provisions to preclude a repetition of the *Schwarz* result.

The section draws a distinction between indemnification for "expenses" and for "liabilities" as those terms are defined in paragraphs 14A:3–5(1) (c) and 14A:3–5(1) (d) respectively. Subsection 14A:3–5(2) *authorizes* indemnification for both "expenses" and "liabilities" under the circumstances stated in that subsection. Subsection 14A:3–5 (3) *authorizes* indemnification for "expenses" under the circumstances stated in that subsection.

Subsection 14A:3–5(4) *requires* indemnification for "expenses" under the circumstances stated in that subsection.

Subsection 14A:3–5(3) changes present law by authorizing indemnification for expenses when ordered by a court even though the corporate agent has been adjudged liable for negligence or misconduct in the performance of his duties.

Departing completely from R. S. 14:3–14, subsection 14A:3–5(4) makes indemnification mandatory in any proceeding in which the corporate agent has been successful on the merits or otherwise, or in defense of any claim, issue or matter therein.

Subsection 14A:3–5(5) provides intracorporate procedures for determining whether a corporate agent meets the relevant standards set forth in subsections 14A:3–5(2) and 14A:3–5(3).

Unlike R. S. 14:3–14, subsection 14A:3–5(6) permits the corporation to advance payments to a corporate agent for expenses incurred prior to a final disposition of a proceeding, provided the corporate agent submits a suitable undertaking to the corporation.

Subsection 14A:3–5(7) is not in R. S. 14:3–14 or the Model Act. It follows section 725 of the New York Act by authorizing judicial proceedings where a corporation fails or refuses to provide indemnification under subsections 14A:3–5(2), 14A:3–5(3) and 14A:3–5(6). The proceedings are also made available upon corporate refusal to provide the mandatory indemnification under subsection 14A:3–5(4).

Subsection 14A:3–5(8) follows both the Model Act and Title 14 by making the indemnification provisions non-exclusive. Unlike the Model Act, subsection 14A:3–5(8) specifically refers to "certificate of incorporation" as one source of more extensive indemnification rights. This addition is intended to prevent the result reached in *S. E. C.* v. *Continental Growth Fund, Inc.,* CCH Fed. Sec. L. Rep. ¶91, 437 (S. D. N. Y. 1964), where indemnification was not permitted because no reference to certificate of incorporation was found in the applicable statute.

Subsection 14A:3–5(9) is also new. It expressly authorizes corporations to purchase and maintain insurance on behalf of a corporate agent against a broad range of expenses and liabilities incurred by the corporate agent while acting in such capacity, including expenses and liabilities for which the corporation does not have the power to indemnify the corporate agent under section 14A:3–5.

Subsection 14A:3–5(10) expressly states that indemnification under section 14A:3–5 is a direct grant of power to corporations not dependent upon certificate of incorporation or by-law provisions.

Provisions Relating to Actions by Shareholders

Source or Reference

N. J.: P. L. 1945, C. 131, §§ 1, 2 and 3 (C. 14:13–15, 14:13–16); R.R. 4:36–2

Model Act: § 43A

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 (C. § 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 Silver Co.*, 68 N. J. Eq. 67 (Ch. 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 C. § 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 the 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.

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."

14A:4–1

Registered Office and Registered Agent

Source or Reference

N. J.: R. S. 14:4–1; 14:4–2; 14:15–3

Model Act: §§ 11; 106

Other: None

Comment

The first three subsections of this section combine and reword sections 11 and 106 of the Model Act, thereby continuing the requirement of present law (R. S. 14:4–2; 14:15–3) that every corporation of this State and every foreign corporation authorized to transact business in this State must at all times have a registered office and a registered agent. Subsection 14A:4–1(4) is not in the Model Act and was added to make clear that prior designations of a principal or registered office (synonymous terms under R. S. 14:4–1) and of a registered agent, currently in effect, continue until changed pursuant to this act.

Subsection 14A:4–1(3) broadens R. S. 14:15–3 in two respects, by omitting the requirement that the registered agent, if a natural person, be "actually resident in this state," and by permitting a foreign corporation authorized to transact business in this State, as well as a domestic corporation, to serve as registered agent. The clause at the end of subsection 14A:4–1(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", is not in the Model Act and was added by the Commission to avoid any possible implication of an intent to repeal C. 17:9A–28(2), under which certain qualified 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, as amended in 1964, 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.

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; 14:6–1; 14:15–3

Model Act: §§ 13; 108

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. Under subsections 14A:4–2(1) and (3), 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). Pursuant to subsection 14A:4–2(2), any notice or demand which is required or permitted by any law of this State to be given to or made on any domestic corporation or authorized foreign corporation or the officers or directors of any such corporation may be sent to or otherwise served at the registered office of the corporation in this State. Subsection 14A:4–2(2) is similar to but goes beyond the second paragraph of R. S. 14:6–1, which applies only to notices given to a domestic corporation, its officers or directors. Subsection 14A:4–2(4) has no counterpart in the Model Act. It is carried over from the third paragraph of R. S. 14:6–1. The Commission considered the first paragraph of R. S. 14:6–1 unnecessary.

14A:4–3

Change of Registered Office or Registered Agent

Source or Reference

N. J.: R. S. 14:4–4; 14:4–4.1; 14:4–5

Model Act: §§ 12; 107

Other: None

Comment

The first two subsections of this section are, in general, a combination of sections 12 and 107 of the Model Act, as amended in 1964. The closest equivalent to the language of Title 14 is the second sentence of subsection 14A:4–3(1), which is derived from the first paragraph of R. S. 14:4–5. Subsections 14A:4–3(1) and (2) continue the essential requirement of Title 14 that a certificate be filed forthwith in the office of the Secretary of State when a domestic corporation or an authorized foreign corporation changes its registered office or registered agent, or when the agent dies, etc.

Subsection 14A:4–3(3) has a counterpart in the Model Act sections and also in R. S. 14:4–6, which was repealed by L. 1963, c. 124, § 4. It was included at the request of the Secretary of State to permit a registered agent to change the registered office of the corporation or corporations for which he or it is acting, when the office is changed to another address in the same municipality or county of this State. Any certificate filed by the registered agent under subsection 14A:4–3(3) may be made effective not later than 30 days after the date of filing. This is new. See paragraph 14A:1–6(1) (c).

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.

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 section 14A:4–3 renders a domestic corporation subject to involuntary dissolution under section 14A:12–6 and an authorized foreign corporation 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) any change of the registered office or registered agent, or both, of a domestic corporation by action of its board and any change of the registered office of a domestic corporation by action of its registered agent constitutes an amendment of its certificate of incorporation, but is one which may be made by complying with the provisions of section 14A:4–3. 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.: P. L. 1963, c. 161, §§ 1 and 2; C. 14:4–7, C. 14:4–8

Model Act: §§ 12; 107

Other: None

Comment

This section is derived from C. 14:4–7 and 14:4–8. The Commission omitted the requirement contained in C. 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 C. 14:4–8. When a resignation by the registered agent of a domestic corporation or an authorized foreign corporation becomes effective under subsection 14A:4–4(3) without any prior designation by the corporation of a new registered agent pursuant to this act, the corporation has neither a registered agent nor a registered office in this State. In such event the service of process provisions of N. J. S. 2A:15–26 et seq. automatically become applicable by their own terms.

14A:4–5

Annual Report to Secretary of State

Source or Reference

N. J.: R. S. 14:6–2

Model Act: §§ 118; 119

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.

14A:5-1

Place of Shareholders' Meetings

Source or Reference

N. J.: R. S. 14:10–4

Model Act: § 26 (1960)

Other: Pa. Stat. Ann. tit. 15, § 2852–501A (1958)

Comment

This section incorporates 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.

Annual Meeting of Shareholders

Source or Reference

N. J.: R. S. §§ 14:10–2; P. L. 1948, c. 67, § 79 (C. 17:9A–79)

Model Act: § 26 (1960)

Other: Del. Code Ann. tit. 8, § 211(c)

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 for their failure to hold a meeting as ordered by the court; (2) it contains a self-executing provision, based on C. 17:9A–79, in the event the by-laws fail to fix a date for the annual meeting; and (3) following the Delaware Act, it allows a one-month or 30-day grace period beyond the date fixed for the annual meeting before such a meeting may be summarily ordered.

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.

14A:5–3

Call of Special Meetings of Shareholders

Source or Reference

N. J.: R. S. 14:10–9
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 (R. S. 14:3–5; Philanthropic Contributions (C. 14:3–13, C. 14:3–13.2); Employees' Stock Participation and Benefits (R. S. 14:9–2); Stockholders' Meeting Called by Stockholders (R. S. 14:10–11); Amendment of Certificate (R. S. 14:11–2); Extension of Corporate Existence (R. S. 14:11–8); Merger or Consolidation (R. S. 14:12–3); Dissolution (R. S. 14:13–1); Insolvency (R. S. 14:14–1).

This section authorizes the president or the board to call a special meeting. In addition, it specifies that such a meeting may be called by such other officers, directors or shareholders as may be provided in the by-laws. 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, regardless of any greater percentage requirement which the by-laws might impose. 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.

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); Stockholders' Meeting Called by Stockholders (R. S. 14:10–11); Amendment of Certificate (R. S. 14:11–2); Extension of Corporate Existence (R. S. 14:11–8); Merger or Consolidation (R. S. 14:12–3); Dissolution (R. S. 14:13–1).

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

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., Holcombe* 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 waiver relates.

14A:5–6

Action by Shareholders Without a Meeting

Source or Reference

N. J.: P. L. 1964, c. 177, § 1; (C. 14:10–9.1)

Model Act: § 138 (1960)

Other: Del. Code Ann. tit. 8, § 228

Comment

Subsection 14A:5–6(1) is identical in substance with section 138 of the Model Act and C. 14:10–9.1, added to Title 14 in 1964.

Subsection 14A:5–6(2) has no counterpart under either Title 14 or the Model Act. It is similar in substance to the Delaware Act. It authorizes a corporation to insert a provision in its certificate of incorporation permitting any corporate action requiring the vote of shareholders, except action required or permitted under Chapter 10 of the Act (Merger, Consolidation, Acquisition of all Capital Shares of a Corporation and Sale of Assets), to be taken on the basis of the written consent of less than all of the shareholders entitled to vote on such action, provided the number of consents received would be sufficient to authorize such action at a meeting at which all shareholders entitled to vote were present.

The provisions of section 14A:5–6 should be of particular utility for the close corporation and to other corporations which have a consolidated block of shares comprising majority control. The provisions of subsection 14A:5–6(2) may also be useful to widely-held public corporations, since under section 14A:5–19(1) a written consent may be given by proxy.

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

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
Model Act: § 29 (Supp. 1966)
Other: Va. Code Ann. § 13.1–30 (1964)

Comment

Unlike Title 14 and the Model Act, section 14A:5–8 requires an alphabetical arrangement of shareholders by class and series. The section follows the substance of section 29 of the Model Act in providing that the list of shareholders shall be prima facie evidence of 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 of 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 and of making the voting list available for examination ten days prior to an election. The Commission believed that the right to inspect and to make extracts granted by section 14A:5–28 eliminated the necessity or desirability of making the voting list available for inspection prior to an election. Moreover, it was clear that any shareholder who wished to communicate with fellow shareholders prior to a meeting would need their names and addresses much sooner than ten days before a meeting. It should be noted that the list of shareholders required by this subsection must be available at all meetings of shareholders, not merely at elections. R. S. 14:10–5 requires the production of the stock and transfer books and list of shareholders only at shareholder meetings held for the purpose of electing directors.

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.

The Commission has eliminated the penalty imposed by R. S. 14:10–5 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 provision of R. S. 14:10–6 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; 14:10–13

Model Act: § 30 (1960)

Other: N. Y. Bus. Corp. Law § 608; D. C. Code Ann. § 29–915 (1961); Va. Code Ann. § 13.1–31

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

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

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 Act.

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 ⅔ in interest of all stockholders or ⅔ in interest of each class of stockholders having voting powers, a vote of ⅔ in interest of the stockholders present and voting or ⅔ 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 section 14A:3–3 (Guaranty Authorized by Shareholders); subsection 14A:5–21(5) (Amendment Deleting

Provision in Certificate as to Control of Directors). In particular, it should be noted that the two-thirds vote standard of Title 14 has been retained in modified form (two-thirds of votes cast rather than of shares issued and outstanding) for corporations organized prior to the effective date of the Revision as to certain major organic corporate changes such as charter amendments, paragraph 14A:9–2(4)(c); merger or consolidation, subsection 14A:10–3(2); sale of assets not in regular course of business, paragraph 14A:10–11(1)(c); dissolution, subsection 14A:12–4(4). Such corporations, however, are given the option of adopting the majority-vote standard as to such matters by a charter amendment adopted by two-thirds of the shareholders.

The Commission believed that the balance of control in many corporations, particularly closely held corporations, could be altered, especially in cases where minority stockholders had relied upon the veto power given to the holders of more than one-third of the outstanding voting shares of a corporation, if the two-thirds vote standard were not retained.

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 (Transfer of Shares and Restrictions on 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 being amended 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 incorpora-

tion 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 ⅔ of all outstanding shares to add, change or delete a higher-than-statutory provision, unless the certificate of incorporation expressly requires more than a ⅔ 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 ⅔ in interest of shareholders in compliance with R. S. 14:11–2.

14A:5–13

Shares Owned or Controlled by the Corporation Not Voted or Counted

Source or Reference

N. J.: R. S. 14:10–8

Model Act: § 31, ¶ 2 (1960)

Other: N. Y. Bus. Corp. Law § 612(b)

Comment

This section clarifies R. S. 14:10–8 by adding the provision respecting the voting of stock held by another corporation. This section is based on paragraph 2 of section 31 of the Model Act.

Shares Held by Another Corporation

Source or Reference

N. J.: P. L. 1948, c. 67, § 87 (C. 17:9A–87)

Model Act: § 31, ¶ 5 (1960)

Other: N. Y. Bus. Corp. Law § 612(g).

Comment

This section has no counterpart in Title 14. It is similar to C. 17:9A–87 and follows the provisions of the Model Act and the New York Act except that it does not require by-law or resolution authorization for the officer or agent who votes the shares on behalf of the corporation. The Commission believed that the burden of ensuring that shares owned by a corporation are properly voted by a person authorized to vote such shares should be on the corporation and that a proxy or ballot signed in the name of a corporation should be presumed to have been duly authorized and should be counted, at least until properly challenged by someone purporting to represent the corporation.

14A:5–15

Shares Held by Fiduciaries

Source or Reference

N. J.: R. S. 14:10–7; P. L. 1948, c. 67, § 89 (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 Section 89 of The Banking Act of 1948 (C. 17:9A–89).

14A:5–16

Shares Held Jointly or as Tenants in Common

Source or Reference

N. J.: P. L. 1948, ch. 67, § 88 (C. 17:9A–88)

Model Act: None

Other: Conn. Gen. Stat. Rev. § 33–311a(f) (1961)

Comment

This section has no counterpart in Title 14. It is derived from section 88 of The Banking Act of 1948 (C. 17:9A–88).

14A:5–17

Voting of Pledged Stock

Source or Reference

N. J.: R. S. 14:10–7
Model Act: § 31, ¶ 8 (1960)
Other: N. Y. Bus. Corp. Law § 612(e)

Comment

This section follows the New York Act and the Model Act by providing that a pledgor shall be entitled to vote his pledged stock only so long as the stock has not been transferred into the name of the pledgee. It changes New Jersey law (R. S. 14:10–7) which provides that the owner of pledged stock shall be entitled to vote such stock, even if the transfer to the pledgee has been registered on the books of the issuing corporation, unless in the transfer the pledgor has expressly empowered the pledgee to vote the stock. This change is consistent with section 12A:8–207 of the Uniform Commercial Code which authorizes an issuer of a security to recognize the registered owner of a security as the person exclusively entitled to vote. The Commission believed that the questions of voting and other rights in pledged stock would be best left as a matter of contract between pledgor and pledgee and that, as a matter of policy, it would be unwise to burden issuers with the duty of determining what is and what is not pledged stock and making appropriate notations as to the voting rights of such stock.

14A:5–18

When Redeemable Shares 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; 14:10–12; P. L. 1948, c. 67 § 90 (C. 17:9A–90)

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, derived from Section 90 of The Banking Act of 1948 (C. 17:9A–90) and is similar to the New York Act.

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.

14A:5–20

Voting Trust

Source or Reference

N. J.: R. S. 14:10–10

Model Act: § 32 (1960)

Other: Del. Code Ann. tit. 8, § 218(b); 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 imposed by Title 14. Several other states presently permit a duration of greater than 10 years. See Cal. Corp. Code § 2231 (21 years); Iowa Code Ann. § 496A–32 (20 years); Minn. Stat. Ann. § 301.27 (15 years); Nev. Rev. Stat. § 78.365 (15 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.

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 ⅔ 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 a 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.

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

Model Act: None

Other: Del. Code Ann. tit. 8, § 221

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; 14:10–15

Model Act: § 31, ¶ 4 (1960)

Other: None

Comment

Subsection 14A:5–24(1) eliminates the requirement of 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, except that the provision of R. S. 14:10–13 with respect to the hours of polling has not been carried over.

14A:5–25

Selection of Inspectors

Source or Reference

N. J.: R. S. 14:10–14; P. L. 1948, c. 67, § 92 (C. 17:9A–92)

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 Section 92 of The Banking Act of 1948 (C. 17:9A–92).

14A:5–26

Duties of Inspectors

Source or Reference

N. J.: R. S. 14:10–6; R. S. 14:10–14; P. L. 1948, c. 67, § 92 (C. 17:9A–92)

Model Act: None

Other: N. Y. Bus. Corp. Law § 611.

Comment

This section, which is based upon Section 92 of The Banking Act of 1948 (C. 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. See section 14A:5–8, which establishes the voting list as prima facie evidence of who is entitled to vote at any meeting.

14A:5–27

Review of Elections by Superior Court

Source or Reference

N. J.: R. S. 14:10–16

Model Act: None

Other: Del. Code Ann. tit. 8, § 225; N. Y. Bus. Corp. Law § 619.

Comment

This section re-enacts present law. The changes from R. S. 14:10–16 are formal only.

Books and Records; Right of Inspection

Source or Reference

N. J.: R. S. 14:5–1; 14:5–1.1; P. L. 1968, c. 168 (C.

Model Act: § 46 (1960)

Other: N. Y. Bus. Corp. Law § 624.

Comment

Subsection 14A:5–28(1) is based upon Title 14 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 á 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 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

Model Act: § 24 (1960)

Other: Del. Code Ann. tit. 8, § 102(b) (3)

Comment

Subsection 14A:5–29(1) is based on alternative section 24 of the Model Act. 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 ⅔ 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.

Subsection 14A:5–29(2) preserves existing preemptive rights in corporations organized prior to the effective date of the Revision. A similar provision is contained in the Delaware Act. The Commission believed it was desirable to retain preemptive rights for such corporations for the same reasons it was desirable to retain the two-thirds shareholder voting standard for major organic corporate actions. See comment to section 14A:5–11.

14A:5–30

Liability of Subscribers and Shareholders

Source or Reference

N. J.: R. S. 14:8–13

Model Act: § 23 (1960)

Other: N. Y. Bus. Corp. Law § 628.

Comment

Subsection 14A:5–30(1) re-enacts 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'l 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).

Board of Directors

Source or Reference

N. J.: R. S. 14:7–1; 14:7–2
Model Act: § 33 (1960)
Other: Del. Code Ann. tit. 8, § 141(a)

Comment

This section enacts the substance of section 33 of the Model Act, except as noted below. 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 its certificate of incorporation otherwise provided" have no counterpart in the Model Act or in Title 14. They are patterned after section 141(a) of the Delaware Act. Together with paragraph 14A:2–7(1)(f), these words mean that provisions in the certificate of incorporation are not unlawful if they restrict the discretion or powers of the Board in the management of the business or conduct of the affairs of the corporation, unless they are prohibited by this Act or by other statute law. See *Katcher* v. *Ohsman,* 26 N. J. Super 28, 97 A. 2d 180 (Ch. Div., 1953) which illustrates that some restrictions upon the Board are permissible without explicit authorization in the statute. See also *Long Park, Inc.* v. *Trenton-New Brunswick Theatres Co.,* 297 N. Y. 174, 77 N. E. 2d 76 (1948), construing New Jersey law, holding invalid an agreement vesting the Board's management powers in a named manager. In any case in which there is doubt as to the validity of a restriction imposed by the certificate, the unanimous consent procedure set forth in subsection 14A:5–21(2) should be employed.

Sections 14A:6–9 and 14A:6–15 permit delegation of authority by the board of directors to committees by provisions in the by-laws, and to officers by resolution or by-laws provisions.

14A:6–2

Number of Directors

Source or Reference

N. J.: R. S. 14:3–1; 14:7–1
Model Act: § 34 (1960)
Other: N. Y. Bus. Corp. Law § 702

Comment

This section follows present law by authorizing one or two directors where there are only one or two shareholders and by providing that the by-laws shall specify the number of directors, subject to any provisions in the certificate of incorporation.

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

Model Act: § 34 (1960)

Other: None

Comment

This section is substantially the same as the last three sentences of section 34 of the Model 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

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-enacts 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

Model Act: § 36 (1960; Supp. 1966)

Other: Del. Code Ann. tit. 8, § 223; Wyo. Stat. Ann. § 17–36.35 (Supp. 1961)

Comment

Subsection 14A:6–5(1) re-enacts 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 section 223(d) 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)).

14A:6–6

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. It differs from the Model Act in providing for shareholder removal of directors without cause only if the certificate of incorporation so provides.

Prior to 1937, the precursor of R. S. 14:7–7, 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 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 subsection 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.

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); 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 Delaware Act. It differs from section 39A of the Model Act in that it permits the consents to be executed after, as well as before, the action voted upon; it does not require a consent to be signed; and, by use of the plural, "consents", it makes it clear that more than one docu-

ment may be used to evidence the consent of the entire board. The Commission believes that these changes are realistic and reflect the exigencies of modern corporate practice. Under this provision, for instance, an executive of a corporation, the board of which is geographically diversified, would probably feel safe in taking emergency action requiring board approval on the basis of telephonic consents to be subsequently followed up by written consents by telegram or cable.

Subsection 14A:6–7(2) 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 P. L. 1964, c. 177 § 1 (C. 14:10–9.1), 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; Del. Code Ann. tit. 8, § 144; N. Y. Bus. Corp. Law § 713; 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. Substantially similar provisions are contained in the New York and Delaware Acts. The rule presently 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). The Commission believed that this rule operates harshly in many cases, and that the rule stated in this section would eliminate the inequities and uncertainties caused by the present rule, leaving undisturbed the power of the courts to deal with such matters under general equitable principles.

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 and is similar to the Ohio and Wisconsin Acts. 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.

14A:6–9

Executive Committee; Other Committees

Source or Reference

N. J.: R. S. 14:7–4; P. L. 1948, c. 67, § 108 (C. 17:9A–108)

Model Act: § 38 (1960)

Other: Del. Code Ann. tit. 8, § 141(c)

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 section 108 of The Banking Act of 1948 (C. 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(c) of the Delaware Act.

Subsection 14A:6–9(3) is also based on C. 17:9A–108.

14A:6–10

Place and Notice of Directors' Meetings

Source or Reference

N. J.: R. S. 14:10–4

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 the 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., Holcombe* 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. 501 (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.

14A:6–11

Loans to Officers or Employees

Source or Reference

N. J.: R. S. 14:8–10

Model Act: § 42 (1960)

Other: Del. Stat. Ann. tit. 8, § 143

Comment

This section authorizes loans and other forms of assistance to officers and other employees. It is similar to section 143 of the Delaware Act, but unlike that provision, 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 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.

The Commission believed that the last sentence of this section, permitting such loans to be with or without interest or security, recognizes and is consistent with the broad programs of employee incentives which have been adopted by many corporations.

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; 14:8–19; 14:13–6

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 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.

Liability of Directors; Presumption of Assent to Action Taken at a Meeting

Source or Reference

N. J.: R. S. 14:8–19

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(e) (1967)

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 opinion of counsel and books of account and written reports of account represented as correct by the officer in charge thereof, the president or the officer presiding at the meeting. Section 141(e) of the Delaware Act also authorizes reliance on books of account and reports.

Except where otherwise expressly provided in this section, directors and any committee designated by the board may rely upon oral representation.

Officers

Source or Reference

N. J.: R. S. 14:7–6

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, while 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; while R. S. 14:7–6 does not; (3) R. S. 14:7–6 requires that the president be chosen from among the directors, while 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, while 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).

Removal and Resignation of Officers; Filling of Vacancies

Source or Reference

N. J.: R. S. 14:7–7
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.

Authorized Shares

Source or Reference

N. J.: R. S. 14:8–1; 14:8–2

Model Act: § 14 (1960)

Other: N. Y. Bus. Corp. Law § 501(a); Del. Code Ann. tit. 8, § 151

Comment

Any class of shares may be divided into series, by the procedure provided in section 14A:7–2, whereas under R. S. 14:8–2 such division is restricted to nonparticipating 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. In this respect, the Act is broader than the Model Act or the New York Act.

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 series or collectively in two or more.

Subject to possible equitable restraints in appropriate cases, shares may be classified in all possible ways not inconsistent with the Act. 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 nonenumerated 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.

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 Foundary Co.*, 74 N. J. Eq. 668 (Ch. 1908), *aff'd*, 75 N. J. Eq. 539, (E. & A. 1909), and sugsequent 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

Model Act: § 15 (1960)

Other: N. Y. Bus. Corp. Law § 502; Del. Code Ann. tit. 8, § 151

Comment

The authorized shares may be divided by board action into classes, as well as into series, if so authorized by the certificate of incorporation. The board may likewise be authorized to fix any characteristic of a class or series, and to change any if no shares of the affected class or series have been issued.

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).

The fourth sentence of subsection 14A:7–2(2) makes plain that the board has power to act under the subsection without regard to the prejudicial effect upon outstanding shares, unless the certificate of incorporation places an express limitation upon the grant of authority.

Unlike R. S. 14:8–2, this section provides 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; 14:8–15

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 6 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. Preincorporation 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 N. J. S. 12A:8–319 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 N. J. 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. 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 in new 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.

Consideration for Shares

Source or Reference

N. J.: R. S. 14:8–1; 14:8–6
Model Act: §§ 17 (1960); 18 (1960)
Other: N. Y. Bus. Corp. Law § 504 (d) and (g)

Comment

This section is based on section 17 of the Model Act, but differs somewhat to attain greater flexibility.

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; 14:8–9

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 it also provides in paragraph 14A:7–3(3) (b) 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, 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.

Redeemable Shares

Source or Reference

N. J.: R. S. 14:8–3
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 effect of redemption upon stated capital is governed by sections 14A:7–16 and 14A:7–18. Financial restrictions upon the exercise of the redemption privilege are 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
Model Act:	§ 18A (Supp. 1966)
Other:	N. Y. Bus. Corp. Law § 505; Del. Code Ann. tit. 8, § 157

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 nonrestrictive character. Unlike R. S. 14:8–4, the subsection permits stock rights and options to be granted by the board, without 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.

Determination of Amount of Stated Capital

Source or Reference

N. J.: R. S. 14:8–6

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:7–8(1) and 14A:7–8(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, nor does it restrict the power of the board to make an allocation from the consideration for such shares to capital surplus.

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. Where different systems of accounting for earned surplus have been employed by component corporations, earned surplus will have to be recomputed on a uniform basis to arrive at the aggregate amount. Good faith estimates will have the same standing as in the case of the initial computations of earned surplus which are made under the Act by corporations which did not previously classify surplus, as provided in subsection 14A:7–20(4). Any reduction in earned surplus required by the transaction itself must of course be reflected in the aggregate, which is net of all such reductions.

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; 14:8–5
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 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 § 1103; 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, § 1601 (1967). 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 require-

ments 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 sescurities 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(3), 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; 14:8–11

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 sections 14A:7–1 and 14A:7–2 to divide shares into classes and series, as compared with section 15 of the Model Act. Subsection 14A:7–11(4) states a rule which is implied also by 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. See subsections 14A:5–21(6) and 14A:12–5(3) and section 14A:8–3.

Shares of Stock; Personal Property; Transfer

Source or Reference

N. J.: R. S. 14:8–12
Model Act: None
Other: Del. Code Ann. tit. 8, § 202

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 (N. J. S. 12A:8–1, *et seq.*) which repealed R. S. 14:8–27 *et seq.*

N. J. S. 12A:8–105 provides that shares are negotiable instruments and N. J. S. 12A:8–204, like subsection 14A:7–12(2) 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.

Subsection 14A:7–12(3) is derived from section 202(c) of the Delaware Act. It enumerates some restrictions upon transfer or registration of transfer which have been commonly used in planning relationships among shareholders and declares them to be enforceable, but subsection 14A:7–12(2) contemplates that other restrictions shall also be enforceable provided the court finds them reasonable. If a given restriction is found to be unenforceable, subsection 14A:7–12(4) substitutes a purchase option in favor of the corporation in accordance with the terms of the subsection. This subsection will enable untested restrictions to be employed more freely by reducing the severity of the sanction in case they are held unreasonable.

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 scrip may be used only to the extent necessary to accomplish accurately share transfers, distributions and various fundamental changes.

Dividends or Other Distributions In Cash or Property

Source or Reference

N. J.: R. S. 14:8–19; 14:8–20

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) which permit dividends from current earnings where there is no surplus. A corporation will normally be able to pay a dividend out of current earnings by applying part of its stated capital to eliminate a surplus deficit; see section 14A:7–19, and subsections 14A:7–20(1) and 14A:7–20(3). For disclosure requirements in such cases, see subsection 14A:7–17(2).

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 (s). 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).

Subsection 14A:7–14(1) also makes explicit that dividends may be declared and paid even though they lower net assets below the amount of the liquidation preferences of outstanding shares unless the certificate of incorporation contains such a restriction.

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; 14:8–20

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 payments of share dividends.

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.

As in the case of dividends in cash or property under section 14A:7–14(1), subsection 14A:7–15(5) makes explicit that a share dividend in shares with a liquidation preference may be declared and paid even though the transaction results in increasing the liquidation preferences of outstanding shares above the amount of net assets, unless the certificate of incorporation contains such a 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; P. L. 1943, c. 175, § 1 (C. 14:8–3.1)

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), 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 instances 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)).

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 co-exist 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).

Subsection (6) changes existing law as stated in *Kleinberg* v. *Schwartz,* 87 N.J. Super. 216 (App. Div. 1965), *aff'd,* 46 N.J. 2 (1965), and returns to the older New Jersey point of view, expressed in *Wolff* v. *Heidritter Lumber Co.,* 112 N.J. Eq. 34 (Ch. 1932), on the status of a former shareholder who has sold out to the corporation on the installment plan. The rejected rule has not been an effective protection for creditors generally, because of the ease with which stated capital may be reduced. It has therefore become a trap for the unwary where corporate procedure has been lax or a weapon for remaining shareholders who seek to avoid a buy-out agreement. In changing the rule, the Commission had in mind the urgent need of participants in a close corporation, whose liquidity

may be inadequate for cash purchases, to be able to plan at long-range for their retirement or for their estates without being forced to liquidate the enterprise. Under subsection (6), if a purchase, otherwise lawful, is made out of surplus, any deferred payment obligation may be treated as an ordinary liability and surplus may be charged immediately. The lawfulness of payment of such an obligation thereafter does not depend upon the fortunes of the corporation between the time of purchase, *i. e.*, when the shares were reacquired, and the time of payment. So long as the corporation is solvent at the time of payment, the state of the net worth accounts is irrelevant. The effect of insolvency upon the lawfulness of such a payment is considered by the Commission to be the same as in the case of any other debt of the corporation, subject to the application of settled equitable principles, and is not determined by this Act.

Subsection 14A:7–16(7) makes explicit that a purchase or redemption may be made even though it causes net assets to become less than the liquidation preferences of outstanding shares, unless the certificate of incorporation contains such a restriction.

The obligation of a corporation to the bona fide purchaser of an overissue under N. J. S. 12A:8–104(1) (a) is considered by the Commission to be subject to the restrictions of section 14A:7–16. The alternative remedy under N. J. S. 12A:8–104(1) (b) 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

This section is 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 receipient 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 subsesction 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).

14A:7–18

Cancellation of Reacquired Shares

Source or Reference

N. J.: R. S. 14:8–3; P. L. 1943, ch, 175, § 1 (C. 14:8–3.1)

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 C. 14:8–3.1, requiring publication of a certificate of redemption and cancellation of reacquired shares, respectively. Unlike R. S. 14:8–3 and C. 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.

14A:7–19

Reduction of Stated Capital by Board Action

Source or Reference

N. J.: R. S. 14:11–1; 14:11–2; 14:11–5

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. 14:11–5, 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) makes explicit that reduction of stated capital may be made by board action without regard to the amount of liquidation preferences of outstanding shares, unless the certificate of incorporation contains such a restriction. Stated capital must, of course, be kept at least equal to the aggregate par value of outstanding shares.

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, § 1704B (1967)

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 § 1704B (1967)). 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.

Employee Benefit Plans

Source or Reference

N. J.: R. S. 14:9–1

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.

14A:8–2

Formulation of Plans; Submission to Shareholders in Certain Instances

Source or Reference

N. J.: R. S. 14:9–2

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 affirmaitve 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.

14A:8–3

Terms of Plan; Issuance of Certificates

Source or Reference

N. J.: R. S. 14:9–1

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.

14A:8–4

Amendment or Termination of Plans

Source or Reference

N. J.: R. S. 14:9–4
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

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
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
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 preexisting, 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 *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 enumerated 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 essentially 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 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–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; 14:4–5; and 14:11–2

Model Act: §§ 12 (1960); 54 (1960)

Other: N. Y. Bus. Corp. Law § 803(b); S. C. Code Ann. § 12–19.2 (Supp. 1967)

Comment

This section describes the following different ways in which amendments may be made: (1) by the incorporators prior to the organization meeting of the directors; (2) by board action alone; (3) by a merger or consolidation as provided for in Chapter 10 of this Act; and (4) by board action and shareholder approval; and (5) by a registered agent's changing the registered office pursuant to subsection 14A:4–3(3). 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. It also refers to an amendment by a registered agent's changing the registered office pursuant to subsection 14A:4–3(3).

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 majority vote unless the certificate of incorporation requires a greater proportion, and except with regard to corporations organized prior to the effective date of the Act, in which case the affirmative vote of two-thirds of the vote cast is required. Compare paragraph 14A:9–2(4) (c) with subsection 14A:10–3(2) and paragraph 14A:10–11(1) (c). For corporations pre-existing the effective date of the Act, the two-thirds voting requirement may be reduced to a majority by an amendment to the certificate of incorporation adopted in accordance with the provisions of paragraph 14A:9–2(4) (d).

Section 14A:9–3 specifies the instances in which class voting is necessary and section 14:9–4 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

Model Act: § 55 (1960)

Other: N. Y. Bus. Corp. Law § 804; Va. Code Ann. § 13.1-57 (1964); Del. Code Ann. tit. 8, § 242(d) (2) (rev. 1967)

Comment

Subsections 14A:9–3(1) and 14A:9–3(2) are based upon various provisions found in R. S. 14:11–3, section 55 of the Model Act, subsection 804(a) of the New York Act, and paragraph 242(d) (2) of the Delaware Act. They distinguish between those amendments approval for which class voting is always required (subsection 14A:9–3(1)) and those for which class voting is required only where the amendment subordinates or otherwise adversely affects the rights and preferences of a class (subsection 14A:9–3(2)).

In addition to making a distinction between the different groups of amendments as indicated, subsections 14A:9–3(1) and 14A:9–3(2) differ in several important respects from R. S. 14:11–3, their counterpart in Title 14. First, subsections 14A:9–3(1) and 14A:9–3(2) expressly provide for class voting by holders of a particular class of shares only, whereas R. S. 14:11–3 does not.

R. S. 14:11–3 permits class voting only when there is no certificate of incorporation provision to the contrary, whereas the two new subsections require class voting in the instances described notwithstanding charter provisions to the contrary.

While different language is employed, the categories set forth in subsections 14A:9–3(1) and 14A:9–3(2) probably encompass all those set forth in R. S. 14:11–3. However, unlike the Title 14 provision, subsection 14A:9–3(2) requires that the amendment subordinate or otherwise adversely affect the rights of the class shareholders. In addition, class voting is absolutely required in the instances specified by subsection 14A:9–3(1).

R. S. 14:11–3 expressly states that class voting by the holders of shares having limited or no voting rights 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 any additional shares in any class of preference or prior preference stock. These provisions are changed by paragraph 14A:9–3(1) (d) and subsection 14A:9–3(2).

Subsection 14A:9–3(3) appears neither in the Model Act nor Title 14. It is patterned after the provisions of section 804(b) of the New York Act and section 13.1–57 of the Virginia Act.

Subsection 14A:9–3(4) 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; 14:11–2

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).

Paragraph 14A:9–4(3) (f) differs from section 56 of the Model Act, in that 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: Del. Code Ann. tit. 8, § 245

Comment

This section is new and is based on section 245 of the Delaware 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.

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.

Procedure for Merger

Source or Reference

N. J.: R. S. 14:12–1; 14:12–2; 14:12–8

Model Act: § 65 (1960)

Other: N. Y. Bus. Corp. Law § 902(a) (3); Del. Code Ann. tit. 8, § 252(b) (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 expect that paragraph 14A:10–1(2) (c) has been clarified to permit as consideration for the merger cash as in the New York Act (N. Y. Bus. Corp. Law § 902(a) (3), or the securities or obligations of corporations not a party to the merger as in the Delaware Act (Del. Code Ann. tit. 8, § 252(b) (3) (Rev. 1967)). 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).

In 1967, R. S. 14:12–1 was amended, with the approval of the Commission, to eliminate the requirement as to similarity of objects of merging corporations. P. L. 1967, ch. 70, § 1. The amendment is followed in the Revision.

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.* v. *Assn. Sons of Poland*, 121 N. J. Eq. 102, 106 (E. & A. 1946). Paragraph 14A:1–2(g) 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. 1930), *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 *Clarke* v. *Gold Dust Corp.*, 106 F. 2d 598 (3d Cir. 1939), *cert. denied*, 309 U. S. 671 (1940); 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.* v. *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; 14:12–2; 14:12–8

Model Act: § 66 (1960)

Other: N. Y. Bus. Corp. Law § 902(a) (3); Del. Code Ann., tit. 8, § 252(b) (3)

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. 14:12–8 be included in subsection 14A:10–2(2).

As in the case of merger (see paragraph 14A:10–1(2) (c)), paragraph 14A:10–2(2) (c) has been clarified to permit as consideration for the consolidation cash as in the New York Act (N. Y. Bus. Corp. Law § 902(a) (3)) or the securities or obligations of corporations not a party to the consolidation as in the Delaware Act. (Del. Code Ann., tit. 8, § 252(b) (3).

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

Model Act: § 67 (Supp. 1966)

Other: N. C. Gen. Stat. § 55–108(a) (1965); Va. Code Ann. § 13.1–70 (1964); Del. Code Ann., tit. 8, § 251(f)

Comment

Subsection 14A:10–3(1) is derived from the first paragraph of section 67 of the Model Act. Unlike the Model Act, however, and also unlike R. S. 14:12–3, this subsection does not permit written notice to be given to the shareholders more than 60 days prior to the meeting at which shareholders will vote to approve or disapprove the plan of merger or consolidation.

Paragraph 14A:10–3(1) (b) follows section 55–108(a) of the North Carolina Act by requiring that notice of meeting shall include or be accompanied by the information specified concerning the shareholders' appraisal rights. Title 14 does not expressly set forth a similar requirement; 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 U. J. 72 (1960).

Subsection 14A:10–3(2) departs from Title 14 and follows the second paragraph of section 67 of the Model Act by specifically requiring a class vote in addition to a vote of all the shareholders entitled to vote, whenever the plan of merger or consolidation contains a provision, which, if proposed as an amendment to the certificate of incorporation, would require approval by a class vote.

Subsections 14A:10–3(2) and 14A:10–3(3) represent a substantial departure from both Title 14 and the Model Act. Both Title 14 and the Model Act require a two-thirds vote; the Revision permits a majority vote to corporations organized after the Revision's effective date, as well as to corporations organized prior to the

Revision's effective date, who amend their certificates of incorporation in the manner provided by subsection 14A:10–3(3).

Subsection 14A:10–3(4) is also radically different from Title 14 and the Model Act. This subsection follows subsection 251(f) of the Delaware Act by eliminating the requirement of approval by the shareholders of a surviving corporation in a merger where the qualifications of paragraphs 14A:10–3(4) (a) and 14A:10–3(4) (b) are met.

Certificate of Merger or Consolidation

Source or Reference

N. J.: R. S. 14:12–3; 14:12–4

Model Act: § 68 (1960)

Other: None

Comment

Subsection 14A:10–4(1) is derived from the substantive part of section 68 of the Model Act. 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.

Merger of Subsidiary Corporation

Source or Reference

N. J. P. L. 1952, ch. 33, § 1 (C. 14:12–10)

Model Act: § 68A (1960)

Other: Del. Code Ann. tit. 8, § 253(a) (rev. 1967); N. C. Gen. Stat., § 55–108.1 (1965)

Comment

Section 14A:10–5 is derived from the 1967 amendment to P. L. 1952. ch. 33, § 1 (C. 14:12–10) P. L. 1967, ch. 117, § 1. It permits a short-form merger where a domestic corporation owns 90 per cent of each class of stock of another domestic corporation or corporations. The 90 per cent requirement was derived from the Delaware statute (Del. Code Ann. tit. 8, § 253(a)). 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.

Unlike C. 14:12–10, subsection 14A:10–5(1) follows the Delaware Act in permitting a downstream merger. Neither Title 14 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

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.

Merger or Consolidation of Domestic and Foreign Corporations

Source or Reference

N. J.: R. S. 14:12–1; P. L. 1952, ch. 33, § 1 (C. 14:12–10)

Model Act: § 70 (1960)

Other: Del. Code Ann. tit. 8, § 252(e) (1967)

Comment

This section substantially follows section 70 of the Model Act.

Subsection 14A:10–7(4) makes 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. C. 14:12–10 does not 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 may 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 between 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 also allows mergers or consolidations between domestic corporations and corporations organized under the laws of a foreign country.

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 or Series of Shares of a Corporation

Source or Reference

N. J.: P. L. 1967, ch. 116 (C. 14:12A–1 to 14:12A–5)

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 follows C. 14:12A–1 to 5 adopted in 1967 as a supplement to Title 14 (L. 1967, c. 116, §§ 1 to 5, *pp.* 558 to 560), which was in turn derived chiefly from the British and Canadian Corporation Acts.

In determining whether 90% 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.

14A:10–10

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

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. R. S. 14:3–5 requires shareholder approval for such transactions, and grants appraisal rights to dissenting shareholders.

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. 2d 518, 169 N. Y. S. 2d 15 (Ct. Apps. 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.

Sale or Other Disposition of Assets Other Than in Regular Course of Business

Source or Reference

N. J.: R. S. 14:3–5; 14:3–6
Model Act: § 72 (Supp. 1966)
Other: None

Comment

This section is derived from 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 its assets (R. S. 14:3–6).

The major departure that section 14A:10–11 makes from both the Model Act and Title 14 is that it permits shareholder approval by a majority rather than a two-thirds vote, to (1) all corporations organized subsequent to the effective date of the Revision, and (2) pre-Revision corporations who adopt an amendment to their certificate of incorporation providing for a majority vote. See paragraphs 14A:10–11(1) (c) and 14A:10–11(1) (d).

Unlike Title 14, paragraph 14A:10–11(1) (c) provides for a class vote.

Also unlike Title 14 and unlike the Model Act, subparagraph 14A:10–11(1) (b) requires that notice of the shareholders' meeting include or be accompanied by a statement regarding the shareholders' right to dissent and appraisal. See also paragraph 14A:10–3(1) (b) and compare subparagraph 14A:10–9(3) (b) (i).

Subsection 14A:10–11(2) differs from Title 14 by permitting abandonment of the proposed sale, lease, exchange or other disposition after approval by the shareholders by board action alone subject, of course, to the rights of third patries. See section 14A:10–8.

Right of Shareholders to Dissent

Source or Reference

N. J.: R. S. 14:3–5; 14:12–6; 14:12–7

Model Act: § 73 (Supp. 1966)

Other: N. Y. Bus. Corp. Law §§ 623(d) and 910(a) (1) (B); Del. Code Ann. tit. 8, § 262(k)

Comment

Subparagraph 14A:11–1(1) (a) (i) departs from both Title 14 and the Model Act and follows subsection 262(k) of the Delaware Act by withholding the right of appraisal in the instances specified. However, the Commission did not adopt the 2,000 shareholder provision of the Delaware Act. Further, whereas the Delaware Act limits the withholding of appraisal rights only with regard to shares registered on a national securities exchange, division 14A:11–1(1) (a) (i) (A) also withohlds the right of appraisal with regard to shares regularly quoted on an over-the-counter market by one or more members of a national or affiliated securities association. Compare paragraph 14A:5–21(3) (b).

Again, subparagraph 14A:11–1(1) (a) (ii) follows subsection 262(k) of the Delaware Act by denying to shareholders a right of appraisal where their vote is not required under subsections 14A:10–3(4) and 14A:10–7(2) to approve a merger or consolidation.

Subparagraph 14A:11–1(1) (b) (i) eliminates the right of appraisal where the shareholders receive readily marketable securities in a sale, lease, exchange or other disposition of all the assets not in the ordinary course of business. This provision departs both from Title 14 and the Model Act. Withdrawal of the right with respect to readily marketable securities was again based upon the Delaware approach in the merger or consolidation situation. Delaware itself grants no right of appraisal whatsoever on the extraordinary disposition of all of the assets.

By eliminating the right of dissent from an extraordinary sale pursuant to a plan of dissolution within one year, subparagraph

14A11–1(1) (b) (ii) also departs from Title 14 and adopts the approach of section 73 of the Model Act and paragraph 910(a) (1) (B) of the New York Act. However, not only are cash transactions excepted as in the Model Act and the New York Act, but also transactions involving only readily marketable securities, or cash and readily marketable securities. The language of division 14A:11–1(1) (b) (ii) (B) is derived from paragraph 14A:5–21(3) (b).

Subparagraph 14A:11–1(1) (b) (iii) is derived from section 73 of the Model Act.

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 fiduciary 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. 1962), *certif. denied*, 38 N. J. 181 (1962). Subsection 14A:11–1(3) is derived from section 623(d) of the New York Act. Subsection 14A:11–1(3) does not preclude 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.

14A:11–2

Notice of Dissent; Demand for Payment; Endorsement of Certificates

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

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 corporation 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.

"Dissenting Shareholder" Defined; Date of Determination of Fair Value

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

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 fair value.

The Commission abandoned the more restrictive standard of "full market value" used in Title 14, in favor of the broader and more flexible test of "fair value" found in the Model Act. In most cases the shares to be appraised will not be readily marketable. See section 14A:11–1.

14A:11–4

Termination of Right of Shareholder to be Paid the Fair 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.,* 76 L. ed 1299 (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).

14A:11–6

Determination of Fair 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 The Banking Act of 1948, P. L. 1948, ch. 67, § 140 (C. 17:9A–140).

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 Fair Value; Commencement of Action to Determine Fair Value

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

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 fair value before any shareholder may commence such action.

14A:11–8

Action to Determine Fair Value; Jurisdiction of Court; Appointment of Appraiser

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

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 fair 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 those cases in which fair value is so readily determinable that the court can appropriately make the determination, the expense of an appraisal may be saved. Compare *Bohrer* v. *United States Lines Co.*, 92 N. J. Super. 592 (Law Div. 1966).

14A:11–9

Judgment in Action to Determine Fair Value

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

Model Act: § 74 (1960)

Other: N. Y. Bus. Corp. Law § 623(h) (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).

14A:11–10

Costs and Expenses of Action

Source or Reference

N. J.: R. S. 14:12–6; 14:12–7

Model Act: § 74 (1960)

Other: N. Y. Bus. Corp. Law § 623(h) (7); S. C. Code Ann. § 12–16.27(i) (7) (Supp. 1967)

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. 14:12–6 and 14:12–7.

14A:11-11

Disposition of Shares Acquired by Corporation

Source or Reference

N. J.: None

Model Act: § 74 (1960)

Other: None

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.

14A:12–1

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. Accordingly, section R. S. 14:13–2 has been omitted from the Revision.

14A:12–2

Dissolution Before Commencing Business

Source or Reference

N. J.: R. S. 14:13–3

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.

14A:12–3

Dissolution Without a Meeting of Shareholders

Source or Reference

N. J.: R. S. 14:13–1

Model Act: § 76 (1960)

Other: None

Comment

This section combines aspects of R. S. 14:13–1 and section 76 of the Model Act. While R. S. 14:13–1 requires the unanimous consent of all shareholders as a condition of a dissolution without a meeting of shareholders, section 14A:12–3 requires the consent of all shareholders entitled to vote on voluntary dissolution. 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, and accordingly, it has not been incorporated in the Revision.

The provisions 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.

Dissolution Pursuant to Action of Board and Shareholders

Source or Reference

N. J.: R. S. 14:13–1
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 except that the two-thirds requirement is retained in cases of corporations organized prior to the effective date of the Revision. The voting requirements may be increased if appropriate provision is made in the certificate of incorporation. 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.

14A:12-5

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.

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. R. S. 14:5–2 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.: P. L. 1938, c. 303, § 1 (C. 14:13–15)

Model Act: § 90 (1960)

Other: None

Comment

This section is based upon C. 14:13–15, but differs materially from it.

C. 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 C. 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, C. 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. C. 14:13–15 further authorizes an action to be brought by a committee of shareholders.

The provision in C. 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 by 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.

14A:12–8

Effective Time of Dissolution

Source or Reference

N. J.: R. S. 14:13–1

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. Section 14A:12–8 eliminates the requirement that the Secretary of State issue a certificate of dissolution and provides that, when a date other than the filing date is specified as the effective date of dissolution, the effective date shall fall not later than 30 days after the date of filing.

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 the Title 14 provisions.

14A:12–9

Effect of Dissolution

Source or Reference

N. J.: R. S. 14:13–1; 14:13–4; 14:13–5; 14:13–6; 14:13–9

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) 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(3) has no counterpart in prior law.

14A:12–10

Revocation of Dissolution Proceedings

Source or Reference

N. J.: P. L. 1951, c. 254, § 1 (C. 14:13–7.1)

Model Act: §§ 81, 82 (1960)

Other: None

Comment

This section represents a combination of parts of C. 14:13–7.1 and sections 81 and 82 of the Model Act.

C. 14:13–7.1 provides for revocation of voluntary dissolution proceedings only by unanimous consent of all directors and 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 C. 14:13–7.1.

14A:12–11

Effect of Revocation of Dissolution

Source or Reference

N. J.: P. L. 1951, c. 254, § 1 (C. 14:13–7.1)
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, 14:13–12

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 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.

14A:12–13

Barring of Claims of Creditors

Source or Reference

N. J.: R. S. 14:13–11

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. Subsection 14A:12–13(2) as to claims in litigation has no counterpart in Title 14, and is patterned after subsection 1007(b) of the New York Law.

14A:12–14

Disposition of Rejected Claims

Source or Reference

N. J.: R. S. 14:13–12

Model Act: None

Other: None

Comment

This section is based on R. S. 14:13–12 and makes no substantial departure from that section.

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

This section specifies with more detail than R. S. 14:13–7 the powers which the court may exercise in respect to dissolutions.

14A:12–16

Distribution to Shareholders

Source or Reference

N. J.: R. S. 14:13–5; 14:13–8

Model Act: § 80 (1960)

Other: None

Comment

The Title 14 sections on which this section is based do not make express provision, as does this section, 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:12–18

JUDGMENT OF DISSOLUTION; FILING COPY

SOURCE OR REFERENCE

N. J.: R. S. 14:13–10
Model Act: None
Other: None

COMMENT

This section re-enacts R. S. 14:13–10 without substantial change.

Holding and Conveying Real Estate

Source or Reference

N. J.: R. S. § 14:15–1

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 the same full powers with respect to New Jersey realty, or any interest therein, as a domestic corporation. As to the latter, see section 14A:3–1. Section 14A:13–1 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:13–3.

Application of Act to Foreign Corporations

Source or Reference

N. J.: R. S. 14:15–2; 14:15–5

Model Act: §§ 100; 116

Other: None

Comment

Subsection 14A:1–3(5) provides that this act shall apply to foreign corporations to the extent provided in this act. A number of provisions in this Revision are expressly applicable to foreign corporations, such as in Chapter 4 and, of course, throughout this Chapter 13. Beyond other sections applicable by their terms, section 14A:13–2 is a basic section in this Revision on the issue of its application to foreign corporations. Related aspects of that question are also treated in subsection 14A:1–3(6) and in section 14A:1–5.

Subsection 14A:13–2(1) is new and sets forth the application of this Revision to foreign corporations duly authorized to transact business in this State on its effective date, which is January 1, 1969. See section 14A:16–3. Such corporations are equated in all respects to foreign corporations procuring certificates of authority under this Revision. Subsection 14A:13–2(1) corresponds in general to subsection 14A:1–3(3) and section 14A:1–7, under which existing domestic corporations to which this Revision applies are placed on a par with corporations organized under this Revision. The text of subsection 14A:13–2(1) is derived from 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:13–2(2) is virtually identical to R. S. 14:15–5, as amended in 1963, which amendment was based on section 100 of the Model Act. In this Revision (see the last paragraph of the Comment to section 14A:13–3) the Commission intentionally departed from the "hands off" approach of Model Act section 99 which, had it been adopted, might have appeared to deny any authority whatever to this State under this Revision to regulate the internal

affairs of a foreign corporation. See 2 *Hornstein, Corporation Law and Practice,* § 590 (1959).

Subject only to constitutional limitations, as expressed in subsection 14A:1–3(6), and to the restraints imposed by the principles of comity, as set forth in *O'Brien* v. *Virginia-Carolina Chemical Corp.,* 44 N. J. 25, 39 (1965), our courts remain free under this Revision, including subsection 14A:13–2(2), to retain jurisdiction in cases involving the internal affairs of a foreign corporation and to grant relief on equitable principles wherever indicated, even to the extent of applying to a foreign corporation in a proper case certain substantive features of this Revision. *Kahn* v. *American Cone & Pretzel Co.,* 365 Pa. 161, 74 A. 2d 160, 162 (Sup. Ct. 1950) (construing the Pennsylvania equivalent of Model Act section 100). There are modern choice of law doctrines developing in this field, which the Commission did not wish to restrict by adopting the approach in Model Act section 99. See *Latty, Pseudo-Foreign Corporations,* 65 Yale L. J. 137 (1955); *Reese & Kaufman, The Law Governing Corporate Affairs; Choice of Law and the Impact of Full Faith and Credit,* 58 Columbia L. Rev. 1118 (1958); *Baraf, The Foreign Corporation—A Problem in Choice-of-Law Doctrine,* 33 Brooklyn L. Rev. 219 (1967).

Subsection 14A:13–2(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. See, also, sections 14A:13–11 and 14A:13–12.

Admission of Foreign Corporation

Source or Reference

N. J.: R. S. 14:15–3

Model Act: § 99

Other: N. Y. Bus. Corp. Law § 1301
N. C. BCA § 55-131(b) (3)

Comment

The two sentences of subsection 14A:13–3(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, respectively. Subject to the provisions of subsection 14A:13–3(2), 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" and subsection 14A:1–3 (6) for the doctrine of federal supremacy, precluding any application of this Revision to interstate and foreign commerce and to foreign corporations in a manner beyond the reach of this State's power. *Eli Lilly & Co.* v. *Sav-on-Drugs, Inc.*, 366 U. S. 276 (1961).

Subsection 14A:13–3(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 (largely taken from N. Y. Bus. Corp. Law § 1301(b), and 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). Paragraph 14A: 13–3(2) (c) is derived from N. C. BCA § 55–131(b) (3).

Subsection 14A:13–3(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). Subsection 14A:13–3(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). Subsection 14A:13–3(3) has counterparts, limited to process only, in the Delaware Act (Del. Code Ann. tit. 8, § 373(b)) and New York Act (N. Y. Bus. Corp. Law § 1301(c)).

The Commission omitted from section 14A:13–3 the two provisions in section 99 of the Model Act relating to the internal affairs of a foreign corporation, the first being the sentence at the end of the first paragraph and the second being part of clause (b) of the second paragraph. As to the approach of this Revision to the internal affairs of a foreign corporation, see the Comment to section 14A:13–2.

Application for Certificate of Authority

Source or Reference

N. J.: R. S. 14:15–3

Model Act: §§ 103; 104

Other: N. Y. Bus. Corp. Law § 1304
Del. Code Ann. tit. 8, § 374

Comment

Subsection 14A:13–4(1) is based on section 103 of the Model Act and New York Bus. Corp. Law § 1304(a). It 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. The requirement in paragraph 14A:13–4(1) (c) is new and is adapted from the Delaware Act (Del. Code Ann. tit. 8, § 374). Another departure from section 103 of 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.

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:13–4(1) is very different from section 104 of the Model Act. As to fees payable on filing documents, see Chapter 15 of this Revision.

As to the names of domestic and foreign corporations, see section 14A:2–2. A notable feature of that section is paragraph 14A:2–2(2) (c), new to this State, under which a foreign corporation whose corporate name is unavailable for use in this State may become authorized to transact business in this State under a fictitious name which is available for corporate use under section 14A:2–2. In such case, the Secretary of State will probably adopt the procedure of issuing the certificate of authority in the corporate name of the foreign corporation but with a restriction therein,

limiting the foreign corporation to the use of the designated fictitious name in transacting intrastate business in this State. See *Blackstone, Permitting Qualification of Corporations Under Similar Names: A Change In The Model Business Corporation Act,* 23 The Business Lawyer 885, 887 (1968).

Subsection 14A:13–4(2) departs from both the Model Act and Title 14 (R. S. 14:1–1 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. In this respect, subsection 14A:13–4(2) follows N. Y. Bus. Corp. Law § 1304(b), which was changed to require that the certificate of good standing be dated not earlier than 30 days prior to the filing of the application.

The Commission elected to maintain in section 14A:13–4 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:13–5

Effect of Certificate of Authority

Source or Reference

N. J.: R. S. 14:15–3

Model Act: § 105

Other: N. Y. Bus. Corp. Law § 1305

Comment

Section 14A:13–5 is based on section 105 of the Model Act and section 1305 of the New York Act. Under subsection 14A:13–2(1) and section 14A:13–5, foreign corporations duly authorized to transact business in this State on and after the effective date of this Revision, January 1, 1969 (see section 14A:16–3), retain their authority to transact business in this State until their authority is suspended (see section 14A:13–7), surrendered (sections 14A:13–8 and 14A:13–9) or revoked (see section 14A:13–10). See, also, section 14A:13–12 under which an action brought by the Attorney General against a foreign corporation may result in an injunction restraining it from the exercise of any franchise or the transaction of any business within this State.

14A:13–6

Amended Certificate of Authority

Source or Reference

N. J.: None

Model Act: § 111

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:13–4(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 90 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.

Paragraph 14A:2–2(2) (c) permits a foreign corporation to be authorized to transact business in this State under a fictitious name when its corporate name is unavailable for use in this State. A foreign corporation authorized to transact business in this State should apply under section 14A:13–6 for an amended certificate of authority not only when it desires to change its corporate name in the jurisdiction of its incorporation but, also, should it ever desire to change the fictitious name adopted pursuant to paragraph 14A:2–2(2) (c).

Change of Name by Foreign Corporation

Source or Reference

N. J.: None
Model Act: § 102
Other: None

Comment

This section is new and is virtually identical to section 102 of the Model Act, as amended in 1967. Applicable only to a foreign corporation which is authorized to transact business in this State, it corresponds to subsection 14A:9–1(1) which has the effect of limiting a change of name by a domestic corporation. See, also, paragraph 14A:2–2(2) (a).

When an authorized foreign corporation changes its corporate name in the jurisdiction of its incorporation, but that name is unavailable for corporate use in this State under section 14A:2–2, its certificate of authority is suspended under this section. To lift the suspension, the foreign corporation must either change its corporate name again, this time to one which is available for corporate use in this State under section 14A:2–2, or the corporation must otherwise pursue one of the three alternatives in section 14A:2–2, viz.: (1) secure a written consent; (2) obtain a court judgment; or (3) adopt a fictitious name for use in this State. *Blackstone, Permitting Qualification of Corporations Under Similar Names: A Change In The Model Business Corporation Act,* 23 The Business Lawyer 885, 888 (1968).

The obvious way for a foreign corporation to avoid most problems of suspension under section 14A:13–7 is to check with our Secretary of State as to the availability of the proposed name here (see subsection 14A:15–3(11)) and to reserve an available corporate name for 120 days under section 14A:2–3 before proceeding with the change in the jurisdiction of its incorporation. A foreign corporation whose certificate of authority has been suspended for 90 days under section 14A:13–7 is subject to revocation of its certificate of authority by the Secretary of State under paragraph 14A:13–10(1) (a).

See, also, section 14A:13–6 and the Comment thereto as to the requirement that an amended certificate of authority be procured on any change of name by an authorized foreign corporation.

14A:13–8

Withdrawal of Foreign Corporation

Source or Reference

N. J.: R. S. 14:15–7; N. J. S. 2A:15–26(b)

Model Act: §§ 112; 113

Other: N. Y. Bus. Corp. Law § 1310

Comment

Subsection 14A:13–8(1) is derived from section 112 of the Model Act. It provides the procedure by which a foreign corporation authorized to transact business in New Jersey may voluntarily surrender its authority and withdraw from this State. No board resolution is required to be filed, as under R. S. 14:15–7. Section 14A:13–8 should be read with section 14A:13–9, which provides for an alternative method of withdrawal when the foreign corporation has had its existence terminated in the jurisdiction of its incorporation 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 and from section 14A:13–9 as being unnecessary in view of R. S. 54:10A–12, which contains the same requirement. See paragraph 14A:1–6(1) (b), incorporating by reference the tax clearance certificate requirements of R. S. 54:10A–12, and see Chapter 15 of this Revision for the fees payable on filing documents in the office of the Secretary of State.

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 N. J. S. 2A:15–26(b) and subparagraph 1310(a) (5) of the New York Act. The authority of the Secretary of State under paragraph 14A:13–8(2) (c) is expressly narrower than the authority of the registered agent under subsection 14A:4–2(1) and under paragraph 14A:13–4(1) (d). Compare *Corporate Dev. Spec., Inc.* v. *Warren Teed Pharm.*, 99 N. J. Super. 493, 496-497 (App. Div. 1968).

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.: P. L. 1938, Ch. 178, § 1 (C. 14:15–7)

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 the jurisdiction of its incorporation or has merged into or consolidated with another corporation. The section is applicable when there has been no withdrawal pursuant to section 14A:13–8. It is derived from section 1311 of the New York Act. Its counterpart is C. 14:15–7.

As to the omission from this Revision of the tax clearance provision in P. L. 1938, ch. 178, § 2 (C. 14:15–8), see the Comment to section 14A:13–8. An amendment of P. L. 1948, ch. 162, § 12 (C. 54–10A–12) is being recommended by the Commission, under which a tax clearance certificate would continue to be a requirement in the routine case of withdrawal by a foreign corporation under section 14A:13–8 but would not be a requirement as to constituent corporations, either domestic or authorized foreign, whenever the surviving corporation in a merger or the new corporation resulting from a consolidation is either a domestic corporation or a foreign corporation authorized to transact business in this State.

14A:13–10

Revocation of Certificate of Authority; Issuance of Certificate of Revocation

Source or Reference

N. J.: R. S. 14:4–5

Model Act: §§ 114; 115

Other: Pa. Bus. Corp. Law § 1013

Comment

This section is new and is based on sections 114 and 115 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 P. L. 1948, ch. 162 § 21 (C. 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 (P. L. 1948, ch. 162 (C. 54:10A–1 et seq.). See, also, section 14A:13–12.

Transacting Business Without Certificate of Authority

Source or Reference

N. J.: R. S. 14:15–4; 14:15–6; N. J. S. 2A:14–10

Model Act: § 117

Other: Texas Bus. Corp. Act, Art. 8.18A

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 (P. L. 1948, ch. 162 (C. 54:10A–1 et seq.)). See, also, subsection 14A:13–12(1), under which the Attorney General may bring an action to enjoin a non-qualifying foreign corporation from transacting business in this State.

R. S. 14:15–4 and 14:15–6 impose upon a non-qualifying foreign corporation a limited disability to sue "upon any contract made by it in this state", and a monetary penalty of $200.00 "for each offense", respectively.

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.* N. J. S. 12A:3–302; compare Art. 8.18A of the Texas Act.

The monetary penalty has been revised by subsection 14A:13–11 (3), which substitutes a penalty within the discretion of the court, ranging from $200.00 to $1,000.00, for each calendar year in which the foreign corporation has transacted business in this State without a certificate of authority. Subsection 14A:13–11(3) also, in effect, enacts a new five year limitation period for the recovery of any such penalty in lieu of the two year limitation period in N. J. S. 2A:14–10(a). In this connection, see subsection 14A:16–1 (3) preserving vested rights, which would include any vested right of defense under N. J. S. 2A:14–10(a). *State by Parsons* v. *Standard Oil Co.*, 5 N. J. 281 (1950), affirmed 341 U. S. 428 (1951).

Subsection 14A:13–11(2) is virtually 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).

See, also, subsection 14A:13–2(3) as to a foreign corporation which transacts business in this State without a certificate of authority.

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).

14A:13–12

Injunction Against Foreign Corporation

Source or Reference

N. J.: P. L. 1948, ch. 162, § 20 (C. 54:10A–20)

Model Act: None

Other: N. Y. Bus. Corp. Law § 1303
Del. Code Ann. tit. 8, § 384

Comment

This section has no counterpart in the Model Act or in Title 14. It is based on § 1303 of the New York Act and § 384 of the Delaware Act and corresponds to section 14A:12–6, under which the Attorney General may bring an action for the dissolution of a domestic corporation.

Section 14A:13–12, like section 14A:12–6, is non-exclusive. Subsection 14A:13–12(3) preserves all other grounds provided by law (such as in C. 54:10A–20) for injunctive relief against a foreign corporation to restrain it from the exercise of any franchise or the transaction of any business within this State.

14A:14–1

DEFINITIONS

SOURCE OR REFERENCE

N. J.: R. S. 25:2–7; 25:2–9; 14:14–3
Model Act: None
Other: Bankruptcy Act, § 1(20), 1(30)

COMMENT

Paragraph (b). "Creditor" is here broadly defined, but, for the limited purposes of instituting a receivership action, a creditor must be one whose claim against the corporation is for a sum certain or a sum which, by computation, can be made certain. (See section 14A:14–2). This follows existing law. See *Lehigh & Wilkesbarre Coal Company* v. *Stevens and Condit Transportation Company,* 63 N. J. Eq. 107 (Ch. 1902); *Gallagher* v. *Asphalt Company of America,* 65 N. J. Eq. 258 (1903); *Hoopes* v. *Basic Company,* 69 N. J. 679 (Ch. 1905), *aff'd,* 72 N. J. Eq. 426 (E. & A. 1906); *Allen* v. *Distilling Company of America,* 87 N. J. Eq. 531 (Ch. 1917); *Gallant* v. *Fashion Piece Dye Works,* 116 N. J. Eq. 483 (Ch. 1934).

Paragraph (e). The definition of "fair consideration" is taken from the Uniform Fraudulent Conveyance Law, R. S. 25:2–9.

Paragraph (f). Chapter 14 of Title 14 of the Revised Statutes does not define "insolvent". The cases decided under Chapter 14 of Title 14, however, make it clear that a corporation is insolvent for the purposes of that chapter when it is unable to pay its debts when they mature through its available assets or the honest use of credit. Paragraph (f) codifies the construction placed upon Chapter 14 by the courts. By adding provision (1) to paragraph (f) of this section, the Commission has introduced a second test for insolvency, which is taken from section 1(20) of the Bankruptcy Act.

Paragraph (h). Although Title 14 of the Revised Statutes is silent on the subject, this section expressly authorizes a corporation to act as a receiver if so authorized by law. Under The Banking Act of 1948 (P. L. 1948, c. 67, §§ 213, 214) only a qualified bank,

as therein defined, may act as a receiver. This includes state-chartered banks, national banks and mutual savings banks having fiduciary powers.

Paragraph (j). The definition of "transfer" is taken from the Bankruptcy Act, § 1(30).

Jurisdiction of the Superior Court; Appointment of Receiver

Source or Reference

N. J.: R. S. 14:14–3; 14:14–4; 14:14–6
Model Act: §§ 90, 92
Other: R. R. 4:56–2

Comment

Paragraph (1) (a). R. S. 14:14–3 provides that any "creditor" may apply for a receiver. By limiting, in this paragraph, the type of creditor who may be a plaintiff in a receivership action to one whose claim is for a sum certain or for a sum which can by computation be made certain, the Commission believes it is codifying the case law developed under R. S. 14:14–3. The test— a sum certain or a sum which can be made certain—is taken from R. R. 4:56–2(a). The Model Act, section 90, provides that a creditor may be a plaintiff in a receivership action when his claim has been reduced to judgment and an execution thereon has been returned unsatisfied, or when the corporation has admitted in writing that the claim is due and it is established that the corporation is insolvent.

Paragraph (1) (b). This paragraph has been expanded to codify the rule in *Bruning* v. *Peralex of New Jersey,* 76 N. J. Super. 184 (Ch. Div. 1962), that a combination of shareholders holding at least 10% of the corporation's stock may bring a receivership action.

Paragraph 1(c). There is no provision in Title 14 authorizing the bringing of an action by the corporation itself. The Commission felt that there was a need in the State law for a provision analogous to the provision in the Bankruptcy Act permitting the filing of a voluntary petition.

Subsection (2) is taken from R. S. 14:14–3 without substantial change.

Subsection (3) is derived from R. S. 14:14–3 and 14:14–4.

Subsection (4) is derived from R. S. 14:14–6. That part of R. S. 14:14–6 which requires a receiver to take and file an oath has not been carried over. R. S. 14:14–6 does not require sureties on the bond, nor does it specify where the bond is to be filed.

The provisions of R. S. 14:14–1 (Directors' duties on insolvency; stockholders' meeting) have not been carried over into the Revision. R. S. 14:14–1 imposes no sanctions. In practice, its provisions seem to have been more often breached than honored. The Commission felt that it is unwise to force the directors to take the action prescribed by R. S. 14:14–1 when the corporation is insolvent in the equity sense, since such an insolvency is not readily determinable as of any given time, and the strict compliance with the statutory mandate could conceivably interfere with bona fide efforts to extricate the corporation from its difficulties. The newly added provision permitting directors to ask for the appointment of a receiver, and the provisions of section 14A:6–14, would appear to minimize the risk that the directors would permit assets to be wasted through their inaction.

While this section makes no mention of foreign corporations, the cases decided under Title 14 hold that R. S. 14:14–3, when read in connection with R. S. 14:14–4 and 14:15–2, confer a limited jurisdiction on the New Jersey courts to appoint receivers for the New Jersey property of foreign corporations. See the cases cited to N. J. S. A. 14:14–3 and 14:14–4, especially *Baldwin* v. *Berry Automatic Lubricators Corporation,* 100 N. J. Eq. 363 (E. & A. 1926). R. S. 14:14–3 and 14:14–4 have their counterparts in this section of the Revision. R. S. 14:15–2 has its counterpart in section 14A:1–3 of the Revision. It is the thought of the Commission that the rule of *Baldwin* v. *Berry Automatic Lubricators Corporation* will be applied to receiverships of foreign corporations after the effective date of the Revision to the same extent as the rule applied before the Revision.

14A:14–3

Multiple Receivers

Source or Reference

N. J.: R. S. 14:14–8

Model Act: None

N. Y. B. C. L.: § 1206(c), (d)

Comment

This section is based partly on R. S. 14:14–8 and partly on § 1206(c) and (d) of the New York Business Corporation Law.

Title to Corporate Property and Franchises

Source or Reference

N. J.: R. S. 14:14–9; 14:14–27

Model Act: None

Other: None

Comment

Subsection (1) is derived from R. S. 14:14–9, paragraph a.

Subsection (2) is derived from R. S. 14:14–27.

Subsections c. and d. of R. S. 14:14–9, which deal with receivers appointed prior to March 26, 1935, have not been carried over into the Revision.

The specific reference to foreign corporations contained in subsection b. of R. S. 14:19–9 has not been carried over into this section. See the Comment to section 14A:14–2.

Powers of Receivers; General

Source or Reference

N. J.: R. S. 14:14–7; 14:14–11; 14:14–30; 14:14–31

Model Act: § 91

Other: None

Comment

Subsections (a), (b), (c) and (d) are derived from R. S. 14:14–7.

Subsections (e) and (f) are derived from R. S. 14:14–11, 14:14–30 and 14:14–31. The Commission was of the opinion that the powers conferred upon masters pursuant to R. S.14:14–30 and 14:14–31 were so similar to those conferred upon receivers as to result in substantial duplication. The provision for the appointment of masters was therefore eliminated, an added reason for such elimination being that references to masters are governed by R. R. 4:54.

Subsections (g) and (h) have no counterpart in Title 14.

R. S. 14:14–18, which provides for the substitution of the receiver as a party to any action pending against the corporation, has not been carried over into the Revision, for the reason that the Superior Court has inherent power to make such a substitution, and for the further reason that subsection (b) of this section is broad enough to provide for such substitution.

No provision has been made for retaining counsel for the receiver, the accountants, appraisers and the like, since the subject is fully covered by R. R. 4:68.

14A:14–6

Powers of Receiver; Contempt of Court

Source or Reference

N. J.: R. S. 14:14–11

Model Act: None

Other: R. R. 4:46–5(c)

Comment

This section is derived from the second paragraph of R. S. 14:14–11. It has been reworded to make it consistent with R. R. 4:46–5(c).

Powers of Receiver; Sale of Property Free of Encumbrances

Source or Reference

N. J.: R. S. 14:14–20

Model Act: None

Other: None

Comment

R. S. 14:14–20 restricts the receiver's right to sell encumbered property to cases where the legality of the encumbrance is questioned and the property is of a character materially to deteriorate in value pending litigation. This section is intended to authorize the Superior Court to approve a sale of property free and clear of liens, whenever the court is satisfied that such sale may reasonably be expected to benefit general creditors, without limiting the court's power to act only when the two grounds specified in R. S. 14:14–20 are present. The holder of an encumbrance is not prevented by this section from enforcing his interest in the property if no benefit to general creditors can reasonably be anticipated. The revised section reflects the rule applied in the federal courts under the Bankruptcy Act. See 4 *Collier on Bankruptcy,* 14th ed., page 1895, ¶ 70.99.

14A:14–8

Rights of Debtors; Setoff; Counterclaim

Source or Reference

N. J.: R. S. 14:14–7

Model Act: None

Other: Bankruptcy Act, § 68

Comment

Subsection (1) is derived from R. S. 14:14–7, but has been restated to conform more nearly with the provision in the Bankruptcy Act, § 68a.

Subsection (2) is derived from § 68b. of the Bankruptcy Act.

14A:14–9

Payment or Delivery to Corporation

Source or Reference

N. J.: R. S. 14:14–7

Model Act: None

Other: None

Comment

R. S. 14:14–7 gave protection to a debtor who, in good faith, paid his debt to the corporation without notice of its insolvency or its suspension of business. Subsection (1) of this section extends the same protection as that extended by R. S. 14:14–7, but eliminates the requirement of good faith and lack of notice.

Subsection (2) has no counterpart in prior law.

In drafting this section, the Commission considered prior law and the provisions of § 70d of the Bankruptcy Act, which protects persons paying debts or delivering property before adjudication or before a receiver takes possession, provided such person does not have knowledge of the bankruptcy, and has acted in good faith. Section 70d does not protect persons acting after a trustee or a receiver is appointed. The Commission felt that it was more important to protect innocent debtors than to protect a corporation's creditors from collusion between the corporation and its debtors.

14A:14–10

Fraudulent Transfers

Source or Reference

N. J.: R. S. 25:2–9; 25:2–10; 25:2–11; 25:2–12; R. S. 25:2–13

Model Act: None

Other: Bankruptcy Act, § 67d.

Comment

In its consideration of the fraudulent transfer and preference provisions of Title 14, the Commission concluded to repeal section 14:14–2 and to substitute for it provisions similar to those contained in the Bankruptcy Act. The Commission felt that there was no logical reason for the enactment on the state level of a harsher rule in respect to fraudulent transfers than that in force on the federal level. By the enactment of the sections of this chapter dealing with fraudulent transfers and preferences, the Commission feels that sufficient safeguards are erected for all creditors while at the same time giving recognition to other creditors who in good faith and without intent to defraud or be preferred acquire preferred or secured positions.

Subsections (1), (2), (3) and (4) are derived, respectively, from R. S. 25:2–10, 25:2–11, 25:2–12 and 25:2–13 (The Uniform Fraudulent Conveyance Law).

Subsections (5) and (6) are derived from section 67d of the Bankruptcy Act.

FRAUDULENT TRANSFERS: CONTINUED

SOURCE OR REFERENCE

N. J.: R. S. 25:2–15; 25:2–16

Model Act: None

Other: Bankruptcy Act, § 67d(6)

COMMENT

Subsection (1) is derived from section 67d(6) of the Bankruptcy Act.

Subsections (2) and (3) are derived from R. S. 25:2–15 (the Uniform Fraudulent Conveyance Law).

Subsection (4) is derived from R. S. 25:2–16 (the Uniform Fraudulent Conveyance Law).

See the general Comment following section 14A:14–10.

FRAUDULENT TRANSFERS: CONTINUED

SOURCE OR REFERENCE

N.J.: None
Model Act: None
Other: Bankruptcy Act, § 67d(7)

COMMENT

See the general Comment following section 14A:14–10.

14A:14–13

Liens by Legal Process

Source or Reference

N. J.: R. S. 14:14–25; 14:14–26

Model Act: None

Other: Bankruptcy Act, §67a

Comment

This section represents a combination of R. S. 14:14–25 and 14:14–26, and section 67a of the Bankruptcy Act.

PREFERENCES

SOURCE OR REFERENCE

N.J.: None

Model Act: None

Other: Bankruptcy Act, § 60

COMMENT

Subsection (1) is derived from section 60a.(1) and 60b. of the Bankruptcy Act.

Subsections (2) and (3) are derived from section 60a.(2) of the Bankruptcy Act.

Subsection (4) is derived from section 60b. of the Bankruptcy Act.

Subsection (5) is derived from section 60c. of the Bankruptcy Act.

14A:14–15

Notice to Creditors

Source or Reference

N. J.: R. S. 14:14–14

Model Act: § 93

Other: None

Comment

This section is derived from R. S. 14:14–14, but has been amplified to make it consistent with the notice procedure provided in the case of voluntary dissolution.

The Model Act allows only 4 months for filing claims after the date of the court order.

14A:14–16

Claims; Presentation; Approval or Rejection

Source or Reference

N. J.: R. S. 14:14–15

Model Act: None

Other: None

Comment

This section carries forward the substance of the comparable provisions of Title 14, the changes being purely formal.

14A:14–17

Claims; Jury Trial

Source or Reference

N. J.: R. S. 14:14–16
Model Act: None
Other: None

Comment

This section conforms with the comparable Title 14 provision.

14A:14–18

Review of Receiver's Actions

Source or Reference

N. J.: R. S. 14:14–18
Model Act: None
Other: None

Comment

This section conforms with the comparable Title 14 provision.

14A:14–19

Discontinuance of Receivership Action

Source or Reference

N. J.: R. S. 14:14–10

Model Act: § 94

Other: None

Comment

The Model Act provision has here been substituted for the comparable provision in R. S. 14:14–10, for the reason that the Model Act provisions allow greater flexibility for the resumption of business. The substance of the second paragraph of R. S. 14:14–10 has been incorporated in section 14A:14–22.

14A:14–22

Judgment of Dissolution

Source or Reference

N. J.: R. S. 14:14–10

Model Act: § 95

Other: None

Comment

This section is based upon the second paragraph of R. S. 14:14–10.

14A:14–23

Reorganization Under Act of Congress; "Plan of Reorganization" Defined

Source or Reference

N. J.: R. S. 14:14–44
Model Act: None
Other: None

Comment

This section is based upon R. S. 14:14–44

14A:14–26

REORGANIZATION UNDER ACT OF CONGRESS; CERTIFICATES

SOURCE OR REFERENCE

N. J.: R. S. 14:14–46

Model Act: None

Other: None

COMMENT

This section provides in general terms what R. S. 14:14–4-6 provides with unnecessary and prolix particularity.

14A:14–27

REORGANIZATION UNDER ACT OF CONGRESS;
POWERS AND DUTIES OF STATE INSTRUMENTALITIES

SOURCE OR REFERENCE

N. J.: P. L. 1948, c. 417 (C. 14:14–46.1)

Model Act: None

Other: None

COMMENT

This section is expresesd in broader terms than the section which is its source.

License Fees Payable by Domestic Corporations

Source or Reference

N. J.: R. S. 14:6–1; 14:16–2

Model Act: § 123

Other: N. C. Bus. Corp. Act § 55–156

Comment

This Chapter distinguishes between license fees and other fees paid to the Secretary of State in connection with documents relating to corporations. This section imposes a license fee which is payable only by domestic corporations, as under R. S. 14:16–1 and 14:16–2, while the next two sections prescribe the fees paid both by domestic and foreign corporations upon the filing and recording of certificates or other documents in the office of the Secretary of State or upon the issuance of certificates by the Secretary of State pursuant to this Revision. As to the execution, filing and recording of documents in the office of the Secretary of State, see section 14A:1–6.

The first two subsections of section 14A:15–1 largely follow the first two paragraphs of Model Act section 123, including the provision that the license fee is based upon the number of shares originally authorized or the increase in the number of shares authorized, whether the shares are of par value or without par value. Under R. S. 14:16–2, a different rate is prescribed for par value shares than for shares without par value. The Commission made this departure from present law to provide greater flexibility to the draftsman in selecting the particular share structure best designed for corporate reasons to meet the requirements of the corporation and its shareholders and to avoid the results under present law where the tax consequences frequently influence, if they do not dictate, the share structure chosen.

Since the license fee is predicated solely on the number of shares without regard to par value, no license fee whatever, not even the $10.00 minimum in subsection 14A:15–1(4), would be due under this section upon any change in shares from par value to no par value, or vice versa, which does not increase the number of shares

authorized. This eliminates any necessity for the credit provision in the second paragraph of R. S. 14:16–2 upon any such change, although the filing fee in section 14A:15–2 would be payable, together with any applicable recording fee under subsection 14A:15–3(13).

The rate in subsection 14A:15–1(2) was fixed by the Commission in the belief that it places this State in a competitive position with other states and yet provides a reasonable return to this State. The rate differs from that suggested in Model Act section 123 and, as already indicated, from the present rate in R. S. 14:16–1 and 14:16–2.

Subsection 14A:15–1(3) differs from Model Act section 123 in two respects. First, it directs that the license fee payable on any increase in the number of authorized shares shall be imposed at the same rate as is provided in subsection 14A:15–1(2). Thus, the license fee imposed on any increase in the number of authorized shares up to 10,000 is one cent for each share of the increase. Second, no credit is allowed for any prior reduction in the number of authorized shares since the filing of the original certificate of incorporation. Thus, if a corporation had 100,000 shares originally authorized, had reduced the number to 60,000 and is now increasing the number to 90,000, the license fee is imposed on 30,000 newly authorized shares at the rate of one cent per share for the first 10,000 shares of the increase and one-tenth cent per share for the remaining 20,000 shares of the increase. The latter provision is not in the Model Act or Title 14 and was added at the request of the Secretary of State.

The $1,000.00 maximum license fee payment under subsection 14A:15–1(4) does not appear in the Model Act or in Title 14. It was derived from the North Carolina statute (N. C. Bus. Corp. Act § 55–156). The $1,000.00 maximum applies to each case set forth in subsection 14A:15–1(1) and does not represent a ceiling for all license fees payable hereunder by a domestic corporation.

14A:15–2

Filing Fees of the Secretary of State

Source or Reference

N. J.: R. S. 14:2–5; 14:6–2; 14:15–9; 14:16–1

Model Act: § 121

Other: None

Comment

The filing fees payable under section 14A:15–2 are in addition to any applicable license fee and recording fee payable under section 14A:15–1 and subsection 14A:15–3(13), respectively. Other miscellaneous filing fees of the Secretary of State and fees for issuing certificates are listed in section 14A:15–3. As to the execution, filing and recording of documents in the office of the Secretary of State, see section 14A:1–6.

All of the fees in this Chapter were fixed after consultation with representatives of the Secretary of State. Before the fees were ultimately determined, consideration was given to the corresponding fees in Title 14 and in other jurisdictions and to those suggested in the Model Act. The representatives of the Secretary of State have expressed satisfaction with the overall result.

Some filing fees are higher, such as the $135.00 qualification fee in paragraph 14A:15–2(4) (a) for a foreign corporation applying for a certificate of authority to transact business in this State, in place of the present $125.00 fee in R. S. 14:16–1. Some filing fees are lower, such as the $20.00 fee in paragraph 14A:15–2(1) (b) for filing a certificate of amendment of the certificate of incorporation, including any number of amendments, in place of the present $20.00 fee in R. S. 14:16–1 for each amendment. Finally, some filing fees in this section and in section 14A:15–3 are entirely new, since they pertain to the filing of documents new to this State, such as in subsection 14A:15–2(2) which fixes a filing fee of $25.00 for filing a restated certificate of incorporation, including any amendments of the certificate of incorporation concurrently adopted, and in subsection 14A:15–3(1) which fixes a filing fee of $10.00 for filing an application to reserve a corporate name and issuing a certificate of reservation.

14A:15–3

Additional Miscellaneous Fees

Source or Reference

N. J.: R. S. 14:15–9; 14:16–1; N. J. S. 22A:4–1

Model Act: § 121

Other: None

Comment

Section 14A:15–3 enumerates certain miscellaneous fees to be charged by the Secretary of State on filing and recording certain documents in his office pursuant to section 14A:1–6, or on issuing certain certificates pursuant to section 14A:1–9, or other applicable law. See, also, sections 14A:15–1 and 14A:15–2, and the Comments thereto.

If no other fee is expressly provided for certificates issued by the Secretary of State or for papers filed in his office, the applicable fee is $5.00 under subsection 14A:15–3(12). The Secretary of State is required by subsection 14A:1–6(4) to record all documents, except annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office. This continues the present practice under R. S. 14:1–4. Pursuant to subsection 14A:15–3(13), the recording fee is $1.00 per page, as under N. J. S. 22A:4–1.