REPORT

TO THE

SENATE OF THE STATE OF MINNESOTA

FROM THE

ADVISORY TASK FORCE ON MINNESOTA CORPORATION LAW

C

TABLE OF CONTENTS

*For more detailed contents of these parts, see the detailed contents below.

Detailed Table of Contents of the Highlights and Notes

	C
21	37
22	39
23	40
24	40
25	41
26	42
27	44
28	44
29	45
30	45
31	46
32	46
33	46
34	47
35	48
36	50
37	50
38	51
39	52
40	53
41	53
42	55
43	56
44	57
45	59
46	61
47	61
48	63
49	64
50	64
51	65
52	65
53	66
54	66
55	67
56	69
57	70
58	73
59	74
60	77
61	79
62	80
63	81
64	82
65	84
66	86
67	86
68	88
69	89
70	90
71	91
72	92
73	94
74	96
75	97
76	98
77	99
78	101
79	102
80	103
81	107
82	112
83	113
84	114
85	119
86	125
87	125
88	126
89	126
90	128
91	128
92	129
93	129

TO THE SENATE OF THE STATE OF MINNESOTA:

Preface

The Advisory Task Force on Minnesota Corporation Law was formed in May, 1979, as a cooperative effort of the Minnesota Senate, the Secretary of State of Minnesota, and the Corporation, Banking, and Business Law Section of the Minnesota State Bar Association. Pursuant to written agreements with the Rules and Administration Committee of the Minnesota Senate, the Task Force committed to carry on a systematic analysis of Minnesota's business corporation laws (principally sections 301.01 to 301.67 of the Minnesota Statutes and related statutory provisions) and to develop and submit to the Minnesota Senate by December 31, 1980, a proposal for revising and modernizing Minnesota's business corporation laws to meet the legitimate and contemporary business needs of local businesses, large and small, whose corporate affairs are governed by those laws.

The Task Force is pleased to submit this Report and the accompanying proposed bill to enact a new Minnesota Business Corporation Act in fulfillment of its undertaking. We urge that the Minnesota Legislature enact the proposed new Minnesota Business Corporation Act during the 1981 Session.

The substance of this Report follows these prefatory comments. First, we describe the problems posed by our present business corporation laws, point out contemporary approaches to corporate law revision undertaken elsewhere, detail the approach adopted and followed by the Task Force as it developed the proposed new Minnesota Business Corporation Act, and highlight the most significant provisions of the proposed new act. Second, our Reporter's section-by-section analysis of the proposed new act follows that discussion and details for each section the derivation of the section, the present Minnesota statutory counterpart, any change from present law, and an explanation of the section. Finally, we set forth the text of the proposed act.

The members of the Task Force and its Committees are lawyers. They devoted countless hours to this project in the process of reading voluminous research materials and researching numerous substantive and policy questions on their own, attending many meetings, debating, deliberating, and, finally, developing the proposed new Minnesota Business Corporation Act. The Task Force and its Committees met a total of 60 times for a total of 205 hours.

Thirteen persons served on the Task Force: Robert W. Boyd, Richard J. FitzGerald, Avron L. Gordon (Chairman, Liquidations and Dissolutions Committee), Williams J. Hay, John S. Hibbs (Chairman), Paul A. Magnuson, Robert A. Minish, Lawrence Perlman, Robert J. Sefkow, Ralph Strangis (Chairman, Fundmental Changes Committee), Burt E. Swanson, Tom Togas, and Robert B. Whitlock (Chairman, Shareholder Rights Committee). Twenty-six additional persons served on active Committees of the Task Force: William F. Archerd, Thomas M. Brown, Earl F. Colborn, Jr. (Chairman, Close Corporations Committee), Patrick J. Delaney, Charlton Dietz, William T. Dolan, Thomas D. Feinberg, George P. Flannery, Gerald T. Flom, James T. Hale, Robert J. Johnson, D. William Kaufman, Glenn R. Kessel, Logan Langworth, Richard G. Lareau (Chairman, Directors and Officers Committee), James B. Lund, Gerald E. Magnuson, Professor Joseph E. Olson, Michael Prichard, Jerry F. Rotman, Henry J. Savelkoul, Paul J. Scheerer, Neil I. Sell, Archibald C. Spencer, Paul M. Torgerson, and Sherman Winthrop. The differing perspectives of the members of the Task Force and the Committees produced particularly lively debate and finely-honed provisions in the proposed new act, reflecting a negotiated and reasonable adjustment of those differences.

We gratefully acknowledge the work of our Reporter, Bert Black, whose exceptional scholarship, administrative talents, and substantial contributions to the development of the proposed new business corporation act cannot be overstated. He coordinated all activities of the Task Force and each of its Committees, somehow kept the project on schedule, helped the Task Force develop and then adhere to its approach, assured that members of the Task Force and the Committees analyzed both sides of all policy issues and were aware of the differing policies reflected in the laws of other states, produced detailed research on a multitude of issues on short notice, drafted countless versions of proposed sections of the act and much of the final proposed act itself, and prepared the section-by-section analysis of the proposed act included in this Report.

We are also indebted to six Liaison Representatives to the Task Force from the legislative and executive branches of government of the State of Minnesota: Peter S. Wattson, Minnesota Senate Counsel, whose considerable expertise, complete objectivity, superior drafting skills, and long hours devoted to this project were invaluable to the Task Force; Sue Halverson, Special Assistant Attorney General in the Consumer Protection Division of the Office of the Minnesota Attorney General; Mark Winkler, Deputy Secretary of State at the time the Task Force was formed; Randy Sayers, Director of the Corporations Division of the Office of the Secretary of State of Minnesota; Tracy Godfrey, representing the Minnesota Department of Economic Development; and Daniel W. Hardy, Assistant to the Commissioner of the Securities Division of the Minnesota Department of Commerce. Our Liaison Representatives participated actively in meetings of the Task Force, helped us focus on problems, policy considerations, and solutions from the perspective of agencies of government and the public generally, suggested various provisions that appear in the proposed act, and otherwise contributed importantly to the development of the proposed new business corporation act.

The early work of the Task Force was aided significantly by Amy A. Anderson, Paul C. Dorn, Philip Finkelstein, and Karmen Nelson, who served as our research assistants while students at the University of Minnesota Law School. Numerous other students at the University of Minnesota Law School and the Hamline University School of Law also rendered valuable legal research assistance to the Task Force and its Committees.

We benefited considerably from the thoughtful comments and suggestions submitted to us by many lawyers, law professors, and organizations in response to our exposure draft of the proposed new business corporation act. Of particular assistance to the Task Force as it developed the final version of the proposal were the extensive critiques of the exposure draft submitted by Professor Richard M. Buxbaum of the School of Law at the University of California, Berkeley; Professor Andrew W. Haines of William Mitchell College of Law; Professor Harry J. Haynsworth of the University of South Carolina School of Law; Raymond B. Ondov of Austin, Minnesota; Paul Marinac of the Office of the Minnesota Revisor of Statutes; Bernard Rosenberg of Minneapolis; Professor W. Edward Sell of the University of Pittsburgh School of Law; Professor Stanley Siegel of the School of Law at the University of California, Los Angeles; Archibald C. Spencer of Minneapolis; Michael J. Welsh of St. Paul; the Corporate Counsel Association of Minnesota; and members of the Committee on Corporate Laws of the Corporation, Banking, and Business Law Section of the American Bar Association.

Finally, we acknowlege our debt to the University of Minnesota Law School and the Office of Senate Counsel of the State of Minnesota for invaluable technical and support services furnished to the Task Force throughout this project.

Background

The Minnesota Supreme Court, in National New Haven Bank v. Northwestern Guaranty Loan Co., 61 Minn. 375, 386, 63 N.W. 1079, 1082 (1895), made the following observation about Minnesota's business corporation laws of the 1890's:

> Every case adds new proof to what has been so often remarked--that the statutes of this state regulating corporations are crude, inconsistent and in conflict with each other, and it is often difficult to spell out of them the real intent of the legislature.

This observation would be essentially accurate if made today.

The Advisory Task Force on Minnesota Corporation Law was formed because of mounting concern that the corporation laws governing Minnesota business corporations are technically and substantively deficient, out of date, and a source of confusion and frustration in the modern business world for shareholders, directors, officers, creditors, governmental agencies, lawyers, and the courts.

Minnesota has the second oldest business corporation laws in the nation. Our present "business corporation act" is found in sections 301.01 to 301.67 of the Minnesota Statutes and was enacted in 1933, partially on the basis of chapter 300 and partially on the basis of the old "Uniform Business Corporation Act" which was relatively contemporary in 1933. It applies to all Minnesota business corporations formed after its enactment other than banks, savings banks, building and loan associations, trust companies and insurance companies, and to pre-1933 general business corporations that did not timely exercise their right to reject it. Our business corporation act has been amended from time to time and in piecemeal fashion since 1933, but it is still basically 1933 legislation in terms of language, style, and underlying philosophy.

The corporation laws governing most Minnesota business corporations are not confined to the business corporation act contained in sections 301.01 to 301.67, although this lack of exclusivity is somewhat obscured by deficient cross-referencing. Business corporations formed or coming under those sections are also governed by substantive provisions of corporation law contained in chapter 300 (e.g., sections 300.03, 300.04, 300.081, 300.10, 300.11, 300.25, 300.36, 300.49, 300.59, 300.61, 300.63, 300.66, and 300.67) and in chapter 316 (e.g., sections 316.02, 316.03, 316.04, 316.05, 316.06, and 316.10).

Chapter 300 is Minnesota's former general business corporation law. Allowing for sporadic and piecemeal legislative interruptions, portions of chapter 300 find their historical statutory basis in the Minnesota Laws of 1858 (the year Minnesota was granted statehood) and, as to some provisions, in our Territorial Laws of 1851. Today, chapter 300 is the principal body of business corporation law applicable to banks, savings banks, building and loan associations, trust companies, insurance companies, and public service corporations, as well as a few general business corporations formed before 1933.

Chapter 316 contains rules governing certain actions against corporations. The legislative antecedents of most of the provisions of chapter 316 also date back to the 1850's.

The Corporations Division of the Office of the Secretary of State informed the Task Force that 6,000 to 7,000 new Minnesota business corporations are incorporated annually. A sampling of new incorporations undertaken by the Corporation Division and the Reporter of the Task Force indicates that in excess of 90 percent of the Minnesota business corporations formed each year are closely-held and that a substantial number of them are

formed without legal assistance.

Needlessly structured formality pervades our business corporation laws. Few opportunities exist for closely-held corporations or publicly-owned corporations to use the more informal and flexible procedures that are available to business corporations in most other states. Our business corporation laws not only fail to reflect these developments elsewhere, but effectively mandate outdated practices and prohibit shareholders and corporate managers from adopting contemporary practices; in other respects, our laws simply fail to provide necessary authorization for the adoption of other contemporary practices.

A specific recitation of each deficiency in our business corporation laws would serve no particularly useful purpose here. However, a general description of some of the more serious deficiencies is illustrative. Our Minnesota business corporation laws:

(1) Impede the ability of shareholders to obtain various information, both economic and noneconomic, relevant to their investment in a corporation;

(2) Fail to reflect the marked changes in recent years in methods of accounting for business transactions and remain wedded, in varying degrees, to such outmoded concepts as "par value", "stated capital", "earned surplus", "paid-in surplus", and "net earnings", which were originally devised to protect the rights of shareholders and creditors, but which no longer serve that purpose;

(3) Do not adequately take into account the needs and practices of closely-held corporations, which, as indicated, comprise more than 90 percent of all Minnesota business corporations;

(4) Require, for no compellingly useful purpose, that new business corporations publish a notice of incorporation and record amendments of articles of incorporation, among other documents, with county recorders, producing essentially needless paper work and expense;

(5) Force reference to provisions of chapter 300 for the authority of a corporation governed by sections 301.01 to 301.67 to make charitable contributions or to furnish, wholly or partially at its own expense, pensions and medical, hospitalization, accident, and disability insurance;

(6) Fail to recognize the contemporary fact that, in many instances, directors, particularly those who are not officers or employees of a corporation, must rely on information or advice furnished to them by officers, employees, or experts in reaching decisions;

(7) Do not expressly recognize the contemporary practice in other states permitting corporate directors substantial flexibility in the decision-making process, including delegating authority (but not responsibility) to committees of the board in addition to an executive committee;

(8) Compel shareholders and our courts to refer to obscure, outdated, and unnecessarily narrow provisions of chapters 300 and 316 for authority to seek, and to grant, equitable relief under various circumstances;

(9) Contain cumbersome rules with respect to fundamental corporate actions, including corporate mergers, exchanges of shares, and dissolutions;

(10) Provide for involuntary dissolution, apparently as an intended means of providing a remedy for certain abuses not otherwise curable, but condition entitlement to that remedy on such stringent and unrealistic standards that involuntary

dissolution is almost never available as a remedy for those abuses;

(11) Frustrate current notions of participatory corporate democracy by permitting holders of voting shares to block proposed corporate actions favored by a substantial majority of shareholders simply by absenting themselves from the decision-making process; and

(12) Essentially ignore the evolution of rules relating to disclosure and accountability provided for in federal and state securities laws.

These deficiencies are curable, and most states long ago set about to update their business corporation laws, often after long study and debate, on the basis of then-prevailing needs and practices, and largely without regard to outmoded provisions already on the books. This pace accelerated after the first version of the Model Business Corporation Act was published in 1946. The Committee on Corporate Laws of the Corporation, Banking, and Business Law Section of the American Bar Association has since then regularly reviewed and periodically updated the Model Act, most recently in 1980.

The current trend in business corporation laws is illustrated by the Model Act, by the Delaware business corporation laws and by new business corporation laws adopted in the 1970's in Arizona, California, Florida, Michigan, and New Jersey, among other states. Portions of the Model Business Corporation Act have been adopted in almost all states, including in a few, quite limited respects, Minnesota. It is significant that the Model Act was long ago used as the basis for revised business corporation statutes in our neighboring states of Wisconsn (1951), North Dakota (1957), Iowa (1959), and South Dakota (1965).

The current trend reflected in modern business corporation laws is toward flexible and enabling legislation and away from predominantly restrictive and regulatory legislation. It reflects recognition of the fact that since the modern business corporation may be national or even international in scope, the state of its incorporation may be largely incidental and be selected primarily on the basis of which state's business corporation law offers the greatest degree of flexibility and the most clear-cut recognition of contemporary business needs and practices.

The current trend offers the flexibility needed by business corporations today and takes account of evolving federal and state securities laws. In addition, most modern business corporation laws reflect recent changes in methods of accounting for business transactions, and they generally simplify, clarify, and modernize the body of law governing business corporations. In short, the current trend is to provide for a general statutory format for the contemporary conduct of corporate business, with sufficient flexibility to enable the parties to alter the format as necessary to meet their legitimate needs.

Approach

The Task Force began its work in June, 1979. It initially sorted out in broad, structural terms the issues confronting it. The first questions related to the basic scope of statutory focus. The Task Force determined that chapters 300 and 316 of the Minnesota Statutes were completely out of date, a circumstance that ordinarily would warrant repeal or, at the least, extensive revision. However, the Task Force determined that it would be inappropriate to repeal or completely revise chapter 300 or chapter 316, or even the portions of those statutory provisions that also apply to corporations formed or

coming under sections 301.01 to 301.67, because serious disruptions could occur in long-standing, legitimate practices of corporations that are not permitted to incorporate under or that rejected the opportunity to come under sections 301.01 to 301.67. Similarly, the Task Force considered, but subsequently rejected, undertaking parallel amendments in the Minnesota securities laws.

Accordingly, the Task Force concluded that it should focus primarily on sections 301.01 to 301.67 and only secondarily on the sections of chapters 300 and 316 applicable to most Minnesota business corporations. After reviewing the business corporation laws embodied in those provisions, the Task Force further concluded that although some of the policy considerations reflected in sections 301.01 to 301.67 and in those sections of chapters 300 and 316 continue to have validity, the corporation laws governing most Minnesota business corporations are generally beyond further piecemeal revision and should be replaced by a clearly written, self-contained, and contemporary new business corporation act.

Finally, the Task Force concluded that after a suitable transition period, all Minnesota business corporations previously formed or coming under sections 301.01 to 301.67 should become subject to the new business corporation act, sections 301.01 to 301.67 should be repealed (the right of repeal is reserved in section 301.59), and all pre-1933 business corporations that rejected sections 301.01 to 301.67 should have an opportunity to elect to come under the new act.

The Task Force than focused on broad policy questions with respect to what functions a sound business corporation law should and should not serve. It was realized at the outset that a sound business corporation law must clearly reflect the still-valid historical notion that corporation law, as such, is fundamentally a collection of rules for internal governance of the rights, powers, duties, liabilities, and responsibilities of shareholders, directors, and officers. Ideally, these rules should balance the interests of each group with care and with an appreciation of the legitimate needs and reasonable expectations of each group in the contemporary business world.

A law that permitted the establishment and continuance of autocratic, unaccountable management would be wholly untenable. On the other hand, a law that placed management in a straitjacket and subjected corporate directors and officers to attack for every act or failure to act would be equally untenable, would seriously disrupt operations of all corporations, large or small, and would certainly result in an early flight of many Minnesota corporations to other states and encourage future organizers of corporations to form their corporations elsewhere. Moreover, although a sound business corporation law should recognize the legitimate interests of creditors, it should balance those interests against the equally strong need for certainty in certain corporate transactions.

The fundamental functions of a sound business corporation law are:

(1) To provide a modern, flexible, and certain framework for governing private rights, which can readily be adapted to the legitimate needs of all corporations, whether publicly-owned or closely-held;

(2) To provide, as rules, all of the provisions that would normally be expected to result from associative bargaining if all parties were represented by counsel, coupled with the expressed flexibility to vary those rules whenever necessary to reflect the actual associative bargain;

(3) To be so comprehensive, straightforward, and clear that transaction costs can be substantially reduced for anyone wishing to form or to be involved in Minnesota corporations;

(4) To eliminate any straitjacket on the development or implementation of programs and policies of honest management;

(5) To permit corporate directors substantial flexibility in the decision-making process, without permitting abdication of their functions and responsibilities;

(6) To reflect the fact that although shareholders bear the risk of changes in the value of their shares (through changes in corporate net worth) and contract with others to manage the assets of the corporation, the interests of shareholders and managers of publicly-owned corporations are not inherently inconsistent, but are usually made consistent by basic market incentives;

(7) To increase the accountability of management and the flow of information to shareholders by providing expanded protection for the rights of shareholders, particularly those holding minority interests;

(8) To recognize the legitimate interests of creditors, while at the same time providing certainty to shareholders, directors, and officers with respect to those interests in certain corporate transactions;

(9) To offer those drafting corporate documents an increased opportunity for creative corporate planning by permitting them to provide precisely the corporate structure that most nearly fulfills the needs of the client; and

(10) To permit recourse to the courts to remedy any possible abuses resulting from substantially increased managerial flexibility.

In essence, then, a sound business corporation law should embody substantial flexibility and informality in matters of procedure, together with substantial disclosure of and accountability for the corporate actions resulting from those procedures.

After formulating its perception in broad outline of the functions to be served by a sound business corporation law, the Task Force focused on the means of implementing each of those functions. Our Reporter developed a comprehensive list of hundreds of specific policy questions, formulated on the basis of provisions in the Model Business Corporation Act and in the corporation laws of Delaware, California, Maryland, and Virginia. Whatever the answer to a policy question, a legislative response was contained in one of those sources or in current Minnesota law.

The Task Force organized Committees, including members of the Task Force and many other experienced lawyers, to study special topics and to develop recommendations for consideration by the Task Force. Separate Committees were organized to study issues pertaining to closely-held corporations; directors and officers; dissolutions; shareholder rights; and corporate mergers, exchanges, and sales of assets. The Task Force itself studied all other relevant topics.

With the aid of sets of policy questions for each topic, members of the Task Force and its Committees were able to focus on, debate, and tentatively decide policy questions related to a particular topic, and then turn to the matching legislative response to each tentative policy decision. After research and further debate, either a policy decision or the matching legislative response was revised in order to reach the desired result. Then, as proposed provisions covering all of the separate topics were combined in the form of a draft statute, substantial additional changes were made to close gaps and to eliminate duplication and internal inconsistencies in language and, in some cases, policy. On August 5, 1980, the Task Force completed an exposure draft of a proposed new business

corporation act and distributed more than 400 copies of the draft to lawyers, law professors, and organizations in Minnesota and throughout the nation. Numerous helpful comments and suggestions were received. On October 1, 1980, the Task Force resumed its meetings and, on its own and on the basis of comments and suggestions submitted to it, developed the final draft of the proposed new Minnesota Business Corporation Act. The proposed new act was unanimously approved at a meeting of the Task Force on December 17, 1980.

Highlights of the Proposal

As is indicated in considerable detail in our Reporter's section-by-section analysis of the proposed act, portions of the proposed new Minnesota Business Corporation Act were derived from provisions in sections 301.01 to 301.67 and chapters 300 and 316 of the Minnesota Statutes. Most of those provisions were rewritten in whole or in part for clarity and consistency with other provisions in the proposed act. Other portions of the proposed new business corporation act were similarly derived from the Model Business Corporation Act and the business corporation laws of California, Connecticut, Delaware, Georgia, Illinois, Maryland, Michigan, New Jersey, and New York. However, other provisions in the proposed new act have no counterpart elsewhere and represent innovations in business corporation law.

For example, the Task Force knew that the corporation laws of various states had been amended or supplemented recently to include special provisions applicable only to closely-held corporations, and that a proposed "Close Corporation Supplement" to the Model Business Corporation Act, also applicable only to closely-held corporations, has been in the drafting stage for the past few years. These special provisions are characterized by extraordinary flexibility and informality and by greatly enhanced shareholder protection, but these provisions also are highly complex, easy to breach, applicable, as indicated, only to closely-held corporations and, then, only to a limited category of closely-held corporations. Because the Task Force estimated that more than 90 percent of all Minnesota business corporations are closely held, its Committee on Close Corporations developed a proposed set of statutory provisions to apply only to closely-held corporations, which went beyond similar laws enacted in other states and did so without the complexity and risks inherent in those laws. The Task Force considered, but ultimately rejected, the concept of separate provisions applicable only to closely-held corporations--not because of a belief that closely-held corporations did not need substantially more flexibility and informality than are available under present law or that the shareholders of those corporations were not entitled to greater protection than is afforded by present law, but because of a perception that the contemporary needs and expectations of shareholders, directors, and officers of a business corporation do not depend solely on whether or not the corporation is closely-held.

Accordingly, in what represents the most innovative development anywhere in the nation, the proposed Minnesota business corporation act embodies the notion that all business corporations, whether closely-held or publicly-owned, should be permitted to operate with substantial flexibility and informality (to the extent consistent with applicable securities and other laws), and that the shareholders of all business corporations are entitled to enhanced protection in terms of disclosure and management accountability. This conclusion affirmed the perception of the Task Force of the functions to be served by a sound business corporation law and set the tone for the proposed new act: substantial flexibility and informality in matters of procedure, together with substantial disclosure of and accountability for the corporate actions resulting from

those procedures.

It is not feasible to summarize here all of the provisions of the proposed new business corporation act, as each section of the proposal is analyzed in our Reporter's section-by-section analysis. However, some provisions represent significant changes in or additions to present law and warrant brief discussion here.

Section 1 - Definitions

The proposed act defines thirty-six words or phrases, whereas the current law defines only twelve. Some of the added terms are defined with reference to definitions already used in other statutes. For example, the definition of "security" in section 1, subdivision 26, uses the definition set forth in Minnesota Statutes, Section 80A.14(q), and the definition of "transaction statement" in section 1, subdivision 33, uses the definition set forth in section 336.8-408(4). Other terms are defined so that repetition of a lengthy list throughout the statute may be avoided. One example is the definition of "legal representative" in section 1, subdivision 16. The remainder of the defined terms have been defined in order to remove uncertainties about the procedures to be followed in certain situations. For example, the definition of "written action" in section 1, subdivision 36, includes duplicate copies of the written action as parts of one instrument, consistent with current practice. Similarly, the definition of "filed with the secretary of state" in section 1, subdivision 11, treats a document as filed when a valid document is delivered to the secretary of state, thus eliminating questions about whether a document is or is not filed if the official stamp does not appear on the document and removing any possibility of risk resulting from an inadvertent delay in affixing the official stamp.

Sections 2 to 4 - Application

Assuming that the proposed new act is enacted during the 1981 session, the act will take effect on July 1, 1981. However, corporations are not required to come under the act until January 1, 1983. This gives the shareholders, directors, and officers of each corporation 18 months to analyze the new law and consider and adopt any necessary amendments in the articles of incorporation or bylaws. During this grace period, new corporations may be formed under either sections 301.01 to 301.67 or the new act. Existing corporations may elect to come under the new act at any time between July 1, 1981 and December 31, 1982.

The proposed act also exempts certain corporations from its application. Chapter 300 contains no reservation of power to amend or repeal the chapter. The absence of that reservation may mean that corporations originally incorporated under chapter 300 and not now subject to sections 301.01 to 301.67 cannot be forced to come under another chapter. Those corporations may, if they choose, elect to come under the proposed act. However, many of these corporations cannot so elect because other chapters of the Minnesota Statutes require them to form under and remain governed by chapter 300.

After the grace period expires, sections 301.01 to 301.67 are repealed, all existing business corporations formed or coming under those provisions will automatically come under the new act, and all new business corporations must form under this act.

It should be noted that certain chapters and sections of chapters that currently apply to business corporations will not apply to corporations governed by the new act. We have taken this approach for two reasons: First, the existence of these

rather out-of-the-way sections creates numerous traps for even the most experienced corporate counsel. By incorporating in the new act substantially all of the substantive law relating to Minnesota business corporations, we hope to reduce that danger. Obviously, some relevant substantive provisions, including the securities and tax laws, do not appear in the new act. However, with these and a few other exceptions, matters affecting the internal affairs of the corporation may be determined by reference to one chapter which may be reproduced and disseminated as a unit more easily than the former hodge-podge of applicable laws. Second, we have examined the policies underlying the sections appearing in those other chapters, and have included in the new act only those policies that appear consistent with contemporary business needs and practices, making reference to other chapters wholly unnecessary with a few minor exceptions applicable only to public service corporations.

Section 3 merely validates any transactions that are commenced prior to the time a corporation comes under the new act, but which are continued or completed after that time.

Section 4 reserves to the Legislature the absolute right to compel corporations incorporated under the new act to abide by all changes in the act that future Legislatures may impose.

Section 5 - Purposes

This section is broadly worded so that prohibitions in other statutes are the only obstacles to incorporation of a forprofit corporation under the new act. Nonprofit corporations remain governed entirely by other chapters, principally chapter 317. The reason for this broad wording is the desire to permit changes in other chapters to control the purposes section. All of the organizations formerly prohibited from incorporating under sections 301.01 to 301.67 must, by the terms of other laws, incorporate under specific chapters, chiefly chapter 300. There is no reason to add a prohibition to that specific directive.

Section 7 - Formation

This section requires much less detail in the articles of incorporation. In fact, only four basic items are required: the corporate name, the address of registered office, the number of authorized shares, and the names and addresses of each incorporator. Thus, "postcard incorporation" will be a reality for persons wishing to avail themselves of the statutory rules without modification.

The remainder of section 7 is devoted largely to the rules that will apply to a corporation choosing to file only a short form (subdivisions 2 and 3) or that will not apply to a corporation filing that form (subdivision 4). The "laundry list" quality of this section is designed to bring the various choices of basic corporate structure to the attention of anyone considering incorporation. This heightened awareness of corporate options at the time of incorporation will avoid problems at later stages in the life of the corporation.

The items included in the list fall into three categories: rules that may be altered only in the articles; rules that may be altered in either the articles or the bylaws, if any, of the corporation; and other rules that may be adopted in the articles or, in all but two cases, the bylaws, but which will not apply unless specifically adopted.

Section 8 - Corporate Name

We have added the word "limited" to the list of words indicating the corporate nature of the organization, primarily because many professional corporations are authorized by chapter 319A to use, and actually use, that word. This section empowers the secretary of state to decide whether a name is or is not

"deceptively similar" to a name in use. The section also warns holders of corporate names of the existence of numerous other laws restricting the use of names.

Section 9 - Reserved Name

Names permitted under Section 8 may be reserved for continuous periods under this section .

Sections 12 to 17 - Amendment of Articles

The most important change in the amendment process from present law is the provision in section 14 which permits the articles to be amended by a majority of the shares represented at a meeting. Other important changes permit the incorporators to amend the articles before shares are issued without having to file completely new articles, as under present law, and require class voting on amendments that would impair in certain ways the rights of shareholders under their "investment contract", that is, the terms of their shares. Generally, the number of occasions requiring class voting has been greatly expanded.

Sections 19 and 20 - Effective Dates; Presumption of Incorporation

The most notable change from present law is that articles and amendments to the articles are effective when filed; effectiveness will no longer depend on the issuance of a certificate. Another change contained in section 20 is the end of de facto corporations. The simplified mode of incorporation under section 7 makes it unnecessary to recognize any corporation which has not complied with the fundamentally simple requirements of that section.

Sections 21 - Powers

Corporations are entities that have limited powers. Section 21 specifically grants many powers to corporations that the current law leaves unstated, in addition to the powers expressly granted in sections 301.01 to 301.67 and in chapter 300. While these powers are too numerous to catalogue here, some of them include the powers to deal in securities, to act as pledgor, to pay pensions and establish profit-sharing plans, to purchase life insurance for persons connected with the corporation, and to advance or loan money to certain persons.

Section 22 - Corporate Seal

This section makes it clear that a corporation may, but need not, have a corporate seal and describes in detail what kinds of seals will be valid if the corporation uses one.

Section 24 - Organization

This new section grants incorporators certain specific powers in organizing the corporate entity. These powers are not explicitly stated in the current statute, but can be vital to successful organization.

Section 25 - Bylaws

This section makes it clear that the corporation may, but need not, have bylaws. It also provides a specific procedure for amending the bylaws.

Sections 26 to 45 - Directors

Section 26 provides new language recognizing the contemporary fact that the board does not necessarily personally manage the corporation. It also gives the shareholders the right to govern the affairs of the corporation directly, either by a unanimous vote or pursuant to a unamimous shareholder

control agreement (see section 76). This right should be particularly useful to the small, closely-held corporations which comprise more than 90 percent of Minnesota business corporations.

Under section 27, a board need consist of only one director, irrespective of the number of shareholders, unlike our present law which requires three directors, or a number of directors equalling the number of shareholders, whichever is smaller.

Section 28 governs the terms of board members, who will serve either for indefinite terms or for fixed terms of five years or less, unless they die, resign, or are removed or disqualified. Those serving indefinite terms must stand for election at regular meetings (see section 65). Directors may also hold over, as under present law, until their successors are qualified.

Section 32 specifically validates classification of directors. Current law has no equivalent provision. The classification may be either by staggered terms of office or by representation of particular classes of shares.

Section 33 changes present law with respect to cumulative voting, both by clarifying how shares are voted cumulatively and, more importantly, by eliminating the former requirement of 24 hours' advance notice of a shareholder's intention to cumulate votes.

Our current law does not specifically provide for resignations by directors. Section 34 governs the method and effective time of a resignation.

Section 37 is consistent with our current law on board meetings, but it contains a change and several new provisions. It requires meetings to be held at the principal executive office, not at the registered office, if no place is fixed for the meetings. It recognizes meetings held entirely by electronic means as valid meetings, if held on proper notice. Finally, it establishes specific rules for waiver of notice of meetings by attendance at the meeting.

Section 38 is entirely new. It permits absent directors to vote directly for or against specific proposals by a written document.

Under section 39, the quorum for directors has now been made the same as the quorum for shareholders (see section 70), that is, a majority, unless the articles or bylaws provide for a larger or smaller number.

Section 40 reflects current law governing the majority required for board approval, but adds a provision that permits the articles to require a larger proportion than the new act may require for a particular action.

Current law requires unanimity for board action without a meeting. Section 41 permits less than unanimous action for routine matters not requiring a vote of the shareholders if the articles permit it.

Section 42 is almost totally without equivalent in the current law. It expressly validates the creation of any number of committees; permits committees to fulfill any function the board assigns; permits any person, whether or not a director, to be a committee member; permits the board to delegate total control of a particular area to a committee, but requires the board to retain full responsibility for all actions of all committees; requires committees to follow the same basic procedures that directors must follow; and requires non-director committee members to conform to the same standard of conduct that directors must meet, but extends to them the same

opportunity for indemnification and advances of expenses available to directors.

Section 43 is totally new. It provides for the establishment of an independent committee of disinterested persons to consider the merits of derivative suits. That committee is independent of the board and may dismiss derivative suits if it finds it in the best interests of the corporation to do so. This validates a practice already permitted by federal case law, and it has been included to avoid any uncertainty with respect to the power of a Minnesota corporation to use this mechanism to terminate the patent abuses of strike suits.

The standard of conduct to which directors will be held under section 44 is the same as under the present statute. However, this section does add two items with respect to the conduct of directors. It permits a director to rely on information provided by certain persons whom a director might assume are in a position to speak with authority. It also places the burden of proving that a director disagrees with the action of the board on that director, and sets forth ways in which that dissent must be expressed.

Section 45 is new. It is intended to cover only the situation where there is self-dealing; other matters, such as those covered by the corporate opportunity doctrine, have been adequately developed in the case law. This section requires a director of a corporation who has a material financial interest, or whose immediate family has a material financial interest, in an organization dealing with the corporation to meet certain standards of fairness or to receive, after full disclosure, the approval of a disinterested majority of the board or the shareholders. Note here that neither an interested director nor the shares owned by that director will be counted in calculating a quorum.

Sections 46 to 54 - Officers

Section 46 eliminates the requirement that there be a president, secretary and treasurer. Instead, the only requirement is that some person act as chief executive officer and some person act as chief financial officer. Both positions may be filled by the same person.

Section 47 outlines the powers and duties of these two required officers. A corporation may prescribe different powers and duties if it wishes.

Section 49 reflects current law in making it clear that one person may hold any number of positions; it also permits that person to execute documents that must be signed by him in two or more official capacities, by one signature and an indication of the capacities in which the documents are signed.

Section 50 is a new provision. If a corporation has failed to choose officers, the persons exercising the powers of the two required officers are deemed to be those officers.

Section 51 restates current law, while making clear the ability of the board to enter into long-term employment contracts with officers.

Section 52 on resignation of officers parallels section 34 on resignation of directors. The resignation provision is not expressly dealt with in the current statute; nor is the vacancy provision.

Section 53 makes it clear that an officer may delegate powers, but may not delegate responsibilities.

The standard of care imposed by section 54 is the same standard imposed by current law. The section requires that certain persons in addition to those chosen directly by the

board conform to that standard. The section does not specifically permit an officer to satisfy that standard by reliance on experts.

Sections 55 to 78 - Shares and Shareholders

Section 55 permits the board to establish classes of shares without amending the articles. For corporations whose shares have no par value, the section sets a par value for limited purposes.

Section 56 simplifies the current law with respect to subscriptions for shares. It extends the period of irrevocability to six months. It also retains the corporate option of enforcing the agreement as a contractual debt, selling the shares for the account of the shareholder, or rescinding the transaction, but the method has been greatly simplified.

Under section 57, future consideration is still valid, but only if it is promised to the corporation in an enforceable written agreement. This gives the corporation an action for damages due to breach of the agreement if that consideration is not transferred to the corporation at the proper time. Receipt of the agreement also constitutes consideration sufficient to permit the corporation to issue shares immediately; under current law, shares may not be issued until the underlying consideration is actually in the hands of the corporation. The section also makes it clear that no consideration is required for shares issued in splits, dividends, or conversions, and provides clearer rules governing liability for deficient consideration, imposing an absolute liability on the shareholder to pay the total consideration agreed to, and imposing conditional liabilities on other persons.

Preemptive rights are covered in detail by section 59, which is totally new and which provides the first specific rules in the history of Minnesota corporate law defining what those rights are, when those rights arise, and how they are to be exercised.

Section 60 permits Minnesota corporations to have uncertificated shares, a concept already part of Article 8 of the Minnesota U.C.C. This section also requires only one signature on each share certificate, and it deems the signature of a former official or agent valid if that person was an officer or agent at the time the certificate was signed. Finally, this section states a more specific rule regarding share certificates as evidence of ownership.

Section 61 merely permits the replacement of lost share certificates suggested by section 336.8-405.

Section 62 is new. It permits corporations to issue fractional shares or to provide alternative methods of transferring value in lieu of fractional shares.

Section 64 is without equivalent in the current statute and expressly validates restrictions on transfers of securities under certain conditions.

Section 65 recognizes that many Minnesota corporations have no need to hold shareholder meetings on an annual basis. It permits the corporation to hold meetings on any less frequent basis it chooses, but it protects shareholders by permitting them to call a meeting under certain easily-met conditions, at the expense of the corporation. At each meeting, each director serving for an indefinite term must stand for election.

Section 66 reflects current law with respect to special meetings, but makes it clear that only those items set forth in the notice may be considered at a special meeting.

Notice is covered in section 67, which is consistent with,

but more detailed than, present law. It also permits waiver of notice orally and by attendance at the meeting in question. Both forms of waiver are new to Minnesota statutory law.

Section 68 states the majority vote needed to approve an action at a shareholder meeting. This presumption replaces the scattered and varying statements of required majorities present in the current law. It also makes it clear that larger voting requirements will be valid if set forth in the articles. Subdivision 2 of this section requires that any class voting on a matter must approve the matter by at least the same percentage as required for all shares voting on the matter.

Section 70 establishes the quorum for meetings of shareholders as a majority, unless the articles or bylaws provide for a larger or smaller number.

Section 71 makes one change and adds three new principles to voting rights. It removes the reference to "closing the corporate books" prior to shareholder meetings which is an outmoded practice. It also permits the corporation to treat beneficial owners as record owners for certain purposes such as forwarding corporate information or voting. It makes it clear that shares owned by joint owners may be voted by any one of them, absent receipt by the corporation of written notice from one of the other joint owners denying authority of a joint owner to vote the shares. Lastly, it establishes the presumption that any shareholder who merely votes, votes all shares in the manner indicated.

Most of the provisions of section 72 are new. Subdivision 1 of this section adds legal representatives to the list of persons who may vote shares of a corporation held by an unrelated corporation. Subdivision 3 prohibits the voting of shares of the corporation held by the corporation (or a subsidiary) in a fiduciary capacity except in strict accordance with the instructions of the beneficial owner. Subdivisions 4 to 7 clarify the voting rights of various classes of fiduciaries, pledgees, or representatives of non-corporate entities.

Section 73 largely reflects current law with respect to proxies. The section permits one joint owner of shares to sign a proxy appointment, unless one of the joint owners either gives written notice to the corporation denying the authority of a joint owner to appoint a proxy, or signs a different proxy appointment. The section also relieves the corporation of liability for accepting votes cast by valid proxies.

Section 74 covers voting trusts, and the only change with regard to them is a provision that permits voting by two or more trustees only if they all agree.

Section 75 is new to the statutes, but simply validates shareholder voting agreements, which have been upheld by the courts.

Section 76 is also totally new to Minnesota statutory corporation law. It permits the shareholders to agree unanimously to bind each other and the corporation upon any matter, even a matter that is traditionally reserved to the board of directors.

Section 77 covers inspection of books and records. The main change here permits shareholders to examine and copy certain categories of corporate documents as a matter of absolute right, without any showing of proper purpose. Other records may be available upon a showing of a "proper purpose", which is defined with the Delaware case law in mind.

Section 78 essentially reflects current law on financial statements except that instead of furnishing the statements on request, the corporation is required to send those statements to

every shareholder, every year.

Section 79 is new in format, and replaces sections in current law applicable to Minnesota business corporations which permit various forms of equitable relief. The new wording leaves the choice of relief to the court.

Sections 80 and 81 - Dissenters' Rights and Appraisal

These sections provide entirely new procedures for asserting dissenters' rights by shareholders. The events upon which dissenters' rights accrue have been greatly expanded from present law to include as a basis for dissent almost every fundamental change, as well as certain amendments to the articles. The appraisal procedure requires shareholders to submit notice of intent to demand payment, to refrain from voting for the proposal, to demand payment and, if they feel the amount paid to be insufficient, to demand supplemental payment. The appraisal section is much more detailed in its procedures than current law which is vague at best.

Sections 82 and 83 - Loans and Obligations

Sections 82 and 83 establish procedures for authorizing loans and advances to persons for both corporate and non-corporate purposes, and for authorizing guarantees for loans to other persons.

Section 84 - Indemnification

Section 84 covers indemnification. While the current law is based on the old Model Act provision, this section is relatively new. Subject to any prohibition or limitation in the articles or bylaws, it mandates indemnification of and advances of expenses to corporate directors, officers, employees, and agents who meet a specific standard of conduct, but prohibits indemnification or advances under any other circumstances. Advances of expenses will not be required for, but will be available to, persons who are witnesses in a proceeding, but have not been made or threatened to be made parties to it. This section expends the use of insurance and requires disclosure to shareholders when indemnification is granted, or advances are made, in derivative actions.

Sections 85 to 88 - Distributions

Most of the philosophy of current law with respect to dividends and when dividends will be permitted is discarded by the proposed act. The old test depended upon the existence of a "surplus" of available assets over the sum of par value, stated value, and liabilities. The new standard requires only that the corporation be able to pay its debts in the ordinary course of business immediately after the distribution. The determination of whether it will be able to pay its debts in the ordinary course of business is left to the discretion of the board, with absolute liability in the board under section 88 if the corporation is unable to pay its debts in the ordinary course of business and if the directors authorized the distributions without conforming to the standard of conduct prescribed in section 44. Similar restrictions are placed on the ability of the corporation to reacquire its own shares by section 86 which also abolishes "treasury shares". Shareholders are absolutely liable for amounts received in violation of the standard for payment of distributions, but only to the extent that the amount they actually received exceeded the amount they would have been entitled to receive if the standard set forth in section 85 had been met.

Sections 89 to 97 - Fundamental Changes

The existing procedures relating fundamental changes have been rewritten so that they are easier to read; moreover, one procedure has been eliminated while a new one has been

introduced. Section 89 generally authorizes mergers, exchanges of shares, and sales of assets. Consolidation, a little-used method of fundamental change, has been eliminated, while an exchange of shares, a newer concept that maintains the existence of the two corporate entities throughout the transaction has been added.

The vote required by section 91 to approve a merger or exchange is a majority of all voting shares, as opposed to the two-thirds vote required by current law. The section also permits the surviving corporation to forego a vote of its own shareholders if the merger or exchange will result in minimal or no dilution of shareholder voting power.

Short-form mergers are permitted under section 93. Instead of the 100 percent ownership required by current law, this section permits short-form mergers if 90 percent or more of the shares of the subsidiary are owned by the parent. However, minority shareholders must be notified of the merger.

Section 94 authorizes the abandonment of a plan adopting a fundamental change and is without equivalent in the current law.

The earliest effective date of a merger is changed by section 95 to the date on which the articles of merger are filed, rather than the date on which a certificate of merger is issued as provided in present law. The opportunity to specify a later effective date is preserved.

Section 97 reflects current law with respect to sales of assets except that subdivisions 3 and 4 are new. They permit the cure of defects in the transfer of assets and the restriction of successor liability to liabilities imposed by the agreement of transfer by other state statutes, such as Article 6 of the U.C.C.

Sections 98 to 119 - Dissolution

These sections authorize three methods of dissolution, all of which are currently authorized by sections 301.01 to 301.67: voluntary dissolution, supervised voluntary dissolution, and involuntary dissolution. There are two sets of procedures, one for voluntary dissolution and another for supervised voluntary and involuntary dissolution. The procedures differ from the current law for each method.

Section 98 generally authorizes these three methods of dissolution and merely rephrases current law. However, there is an additional clause generally authorizing voluntary dissolution by the incorporators of a corporation. Under current law, in order to dissolve, one must apparently issue shares and then have the shareholders approve the dissolution. Section 99 is totally new and further details the procedure to be used by incorporators. Compliance with the procedures set forth in the section will satisfy all requirements for dissolution by the incorporators.

Sections 100 to 107 cover the procedure in voluntary dissolution by the shareholders. Much of the procedure is new.

Section 100 reflects current law for shareholder-approved dissolutions, except that the required shareholder approval has been reduced from at least two-thirds of the voting shares to a majority of the voting shares.

Section 101 introduces a new procedure. After the dissolution is approved by the shareholders, the corporation must file a notice of intent to dissolve with the secretary of state. At the time of that filing, the corporation may start winding up its affairs. However, corporate existence continues, and unlike current law, the authority of directors and officers continues.

Section 102 reflects current law with respect to the collection of assets and payment of debts, but the duty of executing the requirements of the section is left with the directors and officers. Trustees in voluntary dissolution have been eliminated.

Under section 103, the corporation may give creditors notice that it intends to dissolve. The corporation may also give notice to the public by a published notice. This notice is required so that creditors may file claims for debts owed them by the corporation. This is a new concept in Minnesota law. If notice is given under this section, the corporation will be able to wind up its affairs up with more certainty that claims will be barred by section 117.

If the corporation does give notice, section 104, also totally new, requires creditors to file claims within a fixed period of time. Claims not filed during that time are barred by section 117. The virtue of this procedure is that it provides a relatively clear picture of the corporation's liabilities and can be used to wind up the affairs of the corporation as quickly as possible.

Section 105 permits the shareholders of a corporation to revoke a dissolution in the same manner in which they approved the dissolution.

Section 106, governing the articles of dissolution, is consistent with section 301.56, but it is more detailed. It also sets new conditions that must be met in order for the corporation to file the articles of dissolution.

Section 107 merely clarifies which persons have a right to convert voluntary dissolution proceedings into a supervised voluntary dissolution.

Involuntary dissolution is governed by sections 108 to 115. Section 108 sets forth the grounds for involuntary dissolution or alternative equitable relief. Although the grounds are similar to those required by current law, there are differences. Director deadlock is added as a ground; it need not be accompanied by a situation where the corporation is earning no profit. (This matter is also addressed in subdivision 2.) Fraudulent or illegal acts continue to be a ground, but dissolution should be granted more frequently to minor shareholders who have been treated inequitably by management. Subdivision 2 is intended to encourage the courts to grant dissolution more frequently by eliminating the financial condition of the corporation as a factor relevant to that decision. Under this section, the court may award attorneys' fees, both to reimburse expenses and to deter harassment.

Sections 109 and 110 list the powers, duties, and qualifications of receivers. Most of the details are consistent with current law. However, title to the assets does not vest in the receiver.

Sections 111 to 115 detail the proceedings in involuntary dissolution and are consistent with current law, except that dissolution takes place when the decree of dissolution is entered, not when it is filed with the secretary of state.

Section 116 is new. It requires deposit with the State Treasurer of funds otherwise distributable to a shareholder where the shareholder cannot be found.

Section 117 bars claims not filed with the corporation in accordance with the new act. This promotes certainty and clarity in defining the end of exposure to liability. There is a limited exception for after-arising liabilities or situations where the claimant establishes good cause for a tardy filing.

Sections 118 and 119 authorize certain acts of representation or transfer even after the corporation no longer exists.

Sections 120 and 121 - Extension of Period of Duration

These sections merely permit corporations with limited periods of duration provided for in the articles to extend their own existence.

Section 122 - Annual Report

This new section requires each Minnesota corporation to fill out and return to the Secretary of State a simple form supplied and distributed by the Secretary of State. The report will serve as a continuing active status report.

Sections 123 to 125 - Actions Against Corporations

Section 123 is consistent with current law on service as well as the Rules of Civil Procedure. Section 124 is currently applicable to business corporations.

Need for Continuing Review

New ideas for inclusion in business corporation laws have developed rapidly, especially in states that are working aggressively to improve their attractiveness as places of incorporation, and this process will continue in Minnesota and elsewhere. Therefore, while we believe that enactment of the accompanying proposed new Minnesota Business Corporation Act will place Minnesota ahead of all other jurisdictions, we also believe that this new status can be maintained only if our business corporation act continues to receive regular, analytical review, on the basis of changing needs and practices and new ideas generated in Minnesota and elsewhere to accommodate those changes.

December 22, 1980

Respectfully submitted,

ADVISORY TASK FORCE ON
MINNESOTA CORPORATION LAW

By 
John S. Hibbs, Chairman

Reporter's Notes

Preface to Reporter's Notes

The format of these Notes has been inspired by and owes a great deal to the Commentary to the Minnesota U.C.C. which was prepared under the supervision of Professors Robert McClure and Stanley V. Kinyon.

Each Note is divided into four parts. The first part, labeled "SOURCE", identifies the statutory provision or provisions, if any, from which the basic concept of the section has been drawn. In few cases has the language of the section cited been adopted verbatim. In the process of conforming the source provisions to one drafting style, the language of the source provisions has been changed, so that they may have little apparent resemblance to the original.

The second part, labeled "FORMER MINNESOTA PROVISION", cites the sections of Minnesota Statutes, 1980 that have the same or similar effect, or that address the same issue. Some sections of this act have no counterpart in prior law. Some of the sections cited deal with only a small part of the subject of the proposed section.

The third part of each Note, "CHANGE FROM FORMER LAW", is a brief description of the changes this section makes from former law, and, in the case of certain sections, from case law. This part describes all of the major changes contained in each section, but does not detail minor changes.

Part four, labeled "GENERAL COMMENT", contains a discussion of the operation of the section, where the section is not self-explanatory; a discussion of the effect of the section in relation to the other sections of this act; a brief analysis of the impact of the act, occasionally with reference to the interaction with other state or federal laws; and a statement of the general policies behind the section.

Each Note reflects the views of the Reporter and is intended to be a fairly accurate guide to the meaning, intent, and effect of each section, but is not intended to exhaust the possibilities for analysis.

Throughout these Notes, "effective date" has been used; that phrase represents July 1, 1981. The "mandatory effective date" is January 1, 1983.

I would like to acknowledge the invaluable aid of Mr. John S. Hibbs, Chairman of the Advisory Task Force and Mr. Peter S. Wattson, Office of Senate Counsel, for reading and constructively criticizing these Notes. Without their attention, each Note would be less effective in explaining the act; any mistakes or inaccuracies remaining in these Notes are entirely my responsibility.

I would also like to acknowledge the help of Paul Dorn and Philip Finkelstein, who served as my research assistants while I was writing the first draft of each Note. Finally, none of this work could have been done without the secretarial assistance of Laurel Carlson, Lois DeLong and Sheila Higby of the Office of Senate Counsel. My thanks are inadequate to repay the debt I owe these kind and gracious helpers.

Bert Black, Reporter
Advisory Task Force on
Minnesota Corporation Law

Section 1

SOURCE: The sources for the definitions appearing in this section include the Model Business Corporation Act (MBCA), the Uniform Commercial Code (UCC), the California Corporation Code, and the Minnesota Statutes. Slightly less than half of the definitions are newly drafted definitions not drawn from any other source. The source for each definition is cited as part of the brief description, below, of each definition contained in this section.

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.02

CHANGE FROM FORMER LAW: The following terms are no longer defined in this law: "incorporator", "subscriber", "certificate of shares", "allotment", "stated capital", and "acknowledged". These terms are not defined in this section because they are defined in the sections where the terms are used, are not used in this act, or are generally understood.

All of the defined terms except "articles", "corporation", "shares", and "shareholder" are new to the statute. The terms are defined for several reasons: to refer specifically to other statutes which define a term used in this statute; to avoid repetition of lengthy phrases; or to clarify the usage of certain phrases which would otherwise have little inherent meaning.

GENERAL COMMENT:

Subdivision 2 (Acquiring Corporation). This definition is based on MBCA Section 72-A(a). The term is used to identify the corporation that acquires ownership of the shares of another corporation in an exchange of shares. In the typical share exchange, the shares of the acquiring corporation are ultimately distributed to the former shareholders of the acquired corporation and the acquired corporation becomes a subsidiary of the acquiring corporation.

Subdivision 3 (Address). This definition is new. The address of the corporation is its mailing address, except when the term "address" is used with respect to the registered office or principal executive office, in which case the address is the office address, for example, see section 7, subdivision 1. A post office box does not qualify as an address, because the registered office or principal place of business is a place, not a post office box; because that address is the public record of the location of the corporation; a person using that public record to find the registered office or principal place of business (e.g., under section 123 (service of process)) is entitled to the address of the office, not a post office box.

Subdivision 4 (Articles). This definition is derived primarily from Minnesota Statutes, Section 301.02(3), although some of the documents listed in this definition did not appear in that section. The listed documents have been included in the definition so that it is clear that when a shareholder asks the corporation for the "articles", or when a member of the public asks the office of the secretary of state for the "articles", the requesting person will receive the listed documents, all of which are important in determining the relationships among the corporation, its shareholders, and the public.

The effect of subdivision 1 on this subdivision is important. In most contexts, when the word "articles" is used in "Unless the articles provide . . ." or other similar phrases it should not be interpreted to include all of the listed documents; instead, a narrower definition of articles which includes only the articles of incorporation, amendments to the articles (however approved), and statements establishing or fixing the rights and preferences of a class or series of shares pursuant to section 55 is appropriate.

Subdivision 5 (Board). The source of this definition is Cal. Corp. Code Section 155 (West). In this statute, the word "board" is used to refer either to the institution of the board or to the board as a whole. "Director" or "directors" is used when the act discusses the individuals serving on the board either singly or in the aggregate.

Subdivision 6 (Class). This definition is new. Almost any difference will serve to differentiate between two classes (see section 55).

Subdivision 7 (Constituent Corporation). Cal. Corp. Code Section 161 (West) is the source of this definition. The "surviving corporation" (subdivision 33) is also a constituent corporation.

Subdivision 8 (Corporation). This definition is a synthesis of MBCA Section 81 (a)(2), MBCA Section 2(a), and Minnesota Statutes, Section 301.02(2). After the mandatory effective date all domestic business corporations except those incorporated under Chapter 300, are deemed to be within this definition.

Subdivision 9 (Director). The definition is new. A director may also hold other positions, but when used in this statute with regard to such a person, it refers only to the acts of the person holding the office of director in the position of director. See the comment to section 1, subdivision 5.

Subdivision 10 (Distribution). This definition is derived from the new MBCA definition of distribution (MBCA Section 2(i)). The definition is an integral part of the new financial provisions included in sections 85 to 88. The comment to the MBCA section is very useful, and is reproduced below:

> . . . "distribution" is broadly defined to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as stock dividends and stock splits. Thus, the definition encompasses dividends, purchases by a corporation of its own shares, and distributions in liquidation, including partial or complete and voluntary or involuntary liquidation. Where a corporation incurs indebtedness in a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation or incurrence of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation, and the tests of [section 85] must be met at that time. The inclusion of the term "indirect" in the definition is intended to embrace such transactions as the repurchase of parent company stock by a subsidiary whose actions are controlled by the parent, and makes the definition apply to any other transaction in which the substance is clearly the same as a typical dividend or stock repurchase.
>
> 34 Bus. Law 1867, at 1878

Subdivision 11. (Filed with the Secretary of State). This definition is new. It fixes the time of filing at the time the document in question is delivered, either personally or by mail, to the office of the secretary of state, if the document meets all applicable requirements of the new act and is accompanied by the required filing fee. If two or more documents are filed at one time, each document must be accompanied by a separate filing fee. In addition to meeting the requirements imposed by the act upon the particular document, each document must be signed by an authorized person as provided in subdivision 30 and acknowledged under the Uniform Recognition of Acknowledgements Act, Sections 358.32 to 358.40. Failure to meet any of these requirements

results in an incomplete filing and each document filed in that manner is not effective.

The second sentence of the definition is directed to the evidence of filing to be stamped on the document by the office of the secretary of state. Although the effectiveness of the document is not dependent upon the appearance of the stamp, it may be difficult to prove filing of a document not stamped in this manner.

Subdivision 12 (Foreign Corporation). This definition is derived from MBCA Section 2(b). For the purposes of this act, a foreign corporation is a business corporation formed under the laws of another state that is not engaged in banking or insurance. Attention must be paid, however, to the provisions of Chapter 303; that chapter has a much broader definition of "foreign corporation", see Minnesota Statutes, Section 303.02, Subdivision 4.

Subdivision 13 (Good Faith). The source of this definition is Minnesota Statutes, Section 336.1-201(19) (Minnesota U.C.C.). The Minnesota Code Comment by Professor Stanley Kinyon to that U.C.C. section, is reproduced below:

> Subsection 1-201(19) "Good Faith", Minn. Stat. Sec. 512.76(2) (1961) (Sec. 76(2) of the Uniform Sales Act) provided "A thing is done 'in good faith' within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not." Substantially identicl provisions were in the Uniform Warehouse Receipts Bills of Lading & Stock Transfer Acts, Minn. Stat. Sec. 227.58, subd. 2, 228.54, subd. 2 and 302.21, subd. 14 (1961). The definition for the whole U.C.C. in this Subsection (19) is a condensation of these prior definitions and appears to be intended to mean the same thing, namely, "subjective" rather than "objective" good faith.

Sudivision 14 (Intentionally). This definition is derived from Minnesota Statutes, Section 609.02, Subdivision 9, clauses (3) and (5). This definition is consistent with the definition of good faith and does not penalize acts or failures to act which are merely negligent. A purpose to cause or a belief that the act will cause the prohibited result is required in order for the act or failure to act to fall under this definition. The second sentence merely makes it clear that ignorance of the law is no defense.

Subdivision 15 (Know; Knowledge). This definition is derived from Minnesota Statutes, Section 336.1-201(25). The first sentence of the definition is the same as the definition of "know" or "knowledge" in that section. The second sentence differs, however, by excluding those situations where the person may have "reason to know" of a fact. This is not necessarily inconsistent with the U.C.C. definition, but it is more explicit.

Subdivision 16 (Legal Representative). The definition is new. It is defined in order to avoid repetition of the listed categories as well as unlisted categories which fit into the category of those "empowered to act for another person", for example, an attorney-in-fact or a person authorized by a court to act on behalf of a person but who does not fall into one of the listed categories. This definition should be construed liberally, and the doctrine of ejusdem generis ought to be applied to this subdivision rarely, if at all.

Subdivision 17 (Notice). New. Although it may seem inconsistent to use the U.C.C. definition for "know" but not for "notice", it is not inconsistent because of the different use of "notice" in the context of this act. The term "notice" is defined in this subdivision with respect to the formal notice of meetings required by sections 37 and 67 and other sections throughout the statute. The definition of notice is applicable

to the delivery to a corporation or to another person of other documents or information. The definition also makes it clear that oral notice is valid (if proved).

Subdivision 18 (Officer). The definition is new. For the purposes of the new act, subordinate executive employees appointed by officers who are themselves board appointees are not "officers" but are merely employees with only the rights of employees except as provided in section 54.

Suudivision 19 (Organization). The definition is new. Organization includes any entity other than a natural person. This is consistent with the definition of person (subdivision 22). The term is also used in this statute to mean the process of organizing the corporation, but this definition does not apply to the word when used in that context.

Subdivision 20 (Outstanding Shares). The definition is new. The reaquisition referred to is discussed in section 86.

Subdivision 21 (Parent). The source of the definition is Cal. Corp. Code, Section 175. It is true that a numerical test is somewhat arbitrary in this situation and it is virtually certain that there are some Minnesota corporations which own less than 50 percent of the voting shares of another company, but have effective control of and act in the role of "parent" of the subsidiary company. However, the alternative of formulating a definition based upon "control of the subsidiary" which would be, at best, vague is unacceptable. Certainty is more desirable than inclusiveness here, especially when the prime reason for defining parent is to simplify the definition of "related corporation", subdivision 24, a term used in a permissive sense.

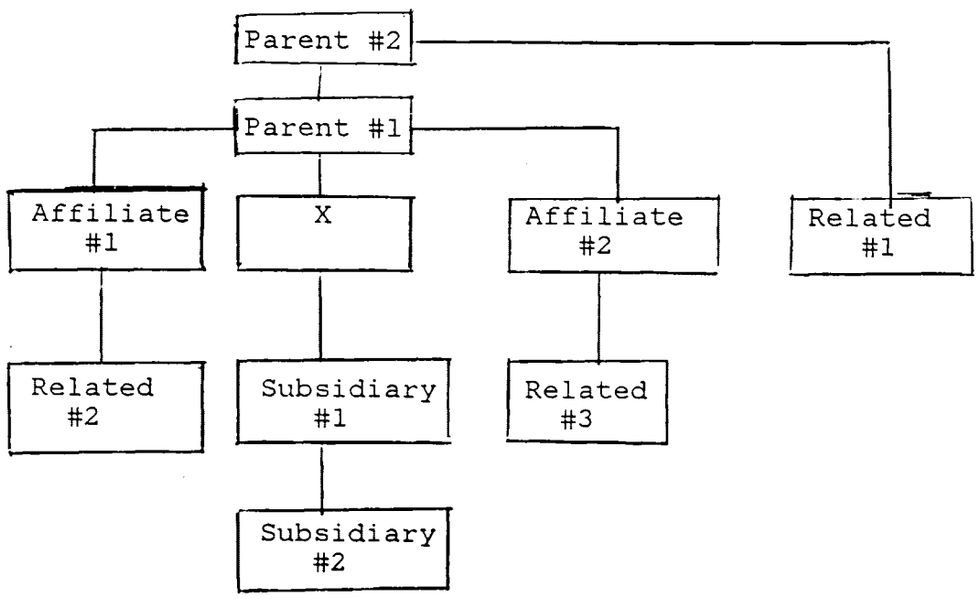
Subdivision 22 (Person). The definition is new and is self-explanatory.

Subdivision 23 (Principal executive office). The definition is new. It is frequently the case that neither the registered office nor the principal place of business (if that place can be determined with any certainty) is the location of the corporate headquarters. However, it is usually true that the offices of the chief executive officer are at the headquarters. We have therefore defined the headquarters as the place at which the chief executive officer has his or her office. If the board of the corporation has not designated a person as the chief executive officer, the registered office will serve as the principal executive office because the location of that office is certain.

Subdivision 24 (Registered Office). The definition is new, and is self-explanatory.

Subdivision 25 (Related Corporation). The definition is new. It is defined so that all corporations forming part of a single economic unit are considered "related". It includes affiliates ("brother-sister corporations") as well as parent or subsidiary corporations.

For example, in the illustration below, all of the pictured corporations are "related" to X corporation:



Subdivision 27 (Series). The definition is derived from Cal. Corp. Code, Section 183. As in the case of the definition of "class", almost any difference will serve to distinguish two series from each other. Moreover, the distinction between a class and a series has been made largely irrelevant. For those cases where the distinction is relevant, a type of share which has different rights and preferences from all other shares (that is, a share that has at least one characteristic different from with another share), is of a different class in spite of any labeling to the contrary. A share which differs in up to all but one right may be either of a different series or class, depending upon how the articles, the bylaws or the board characterize the share.

Subdivision 28 (Share). The definition comes from MBCA Section 2(d), and is self-explanatory. The word stock is not used in this act.

Subdivision 29 (Shareholder). The definition comes from MBCA Section 2(f).

Subdivision 30 (Signed). The definition is new, except to the extent it refers to Minnesota Statutes, Section 645.44, Subdivision 14. That section controls the form of the signature with the exception listed in clause (b) of this subdivision. The signature must be the actual signature of an authorized person if the document is to be filed with the secretary of state. If the document is not to be filed with the secretary of state, a facsimile signature may be used.

Subdivision 31 (Subsidiary). The definition comes from Cal. Corp. Code, Section 189. The comment to subdivision 21 with respect to the definition of "parent" applies here as well.

Subdivision 32 (Surviving corporation). The definition comes from MBCA Section 71(a). It is self-explanatory.

Subdivision 33 (Transaction statement). The definition is itself a reference to Minnesota Statutes, Section 336.8-408.

Subdivision 34 (Vote). The source of this definition is Cal. Corp. Code, Section 194. A written consent by an individual is his or her "vote"; an action taken by written action has been "voted" upon.

Subdivision 35 (Voting Shares). The definition is new. Of course, not all outstanding shares may be entitled to vote.

Subdivision 36 (Written action). This definition is also new, and it clarifies the status of the counterparts of such an action as parts of the same action.

Section 2

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.60, 301.62 and 301.63

CHANGE FROM FORMER LAW: Unlike the application provisions of Chapter 301, this section does not permit corporations to reject the proposed law. However, existing corporations may elect to come under the new law before they are required to come under that law (subdivision 7), by a vote of the holders of a majority of the shares present at a shareholders meeting. Also, unlike the transition provisions of Chapter 301, this act permits corporations to form under either Chapter 301 or the new act during the transition period.

This section deems all existing corporations to be governed by this law on the mandatory effective date as of which time Chapter 301 is be repealed. After the mandatory effective date all business corporations must be formed under this law.

Subdivision 9 renders certain chapters inapplicable to business corporations governed by this chapter. Minnesota Statutes, Section 301.61 did not render all of these sections inapplicable to business corporations.

GENERAL COMMENT:

This section automatically subjects almost all existing Minnesota business corporations to the provisions of this chapter. The only exceptions to this general rule are those business corporations that were formed under Chapter 300 before 1933 and that rejected Chapter 301. The dual nature of Minnesota corporation law should not be continued, and, therefore, this chapter will completely supplant Chapter 301 in all respects and will apply to as many Minnesota business corporations as possible.

Subdivision 1 permits certain Chapter 300 corporations to elect to be governed by this act pursuant to subdivision 3. It is possible that no Chapter 300 corporation can be forced to accept this chapter, because of the absence from Chapter 300 of a reservation of power section similar to Minnesota Statutes, Section 301.59 or section 4 of this act.

The only Chapter 300 corporations that may elect to be governed by the new act are those corporations formed to transact businesses which are not expressly required by other statutes to form under Chapter 300; all banking and most insurance companies must, by the terms of Minnesota Statutes, Sections 47.12 and 60A.07, form under Chapter 300. Chapter 317 corporations cannot incorporate under this law because they do not have a business purpose as required by section 5. If future legislatures permit banks and insurance companies to form under this law by changing the provisions cited above, no change in this section will be necessary to effect that result.

Subdivision 2 provides that eligible business and professional corporations may choose to be governed by this act, or in the case of professional corporations, this act and Chapter 319A, by electing, at any time after the effective date of this act, to come under the act. Existing corporations should not hastily elect to come under this chapter; any time spent examining the new act and reshaping the articles to take advantage of the new flexibility provided for by the new act will almost certainly be time well spent, and this section provides a transition period for just that purpose. Early election may in some cases help the corporation avoid any last-minute confusion due to adjustment to the new law.

Subdivision 3 requires that electing coporations must conform their articles to the provisions of this chapter. The conforming amendments are to be approved under the law governing the corporation prior to election, most likely Minnesota Statutes, Section 301.37. It is unlikely that many amendments will be necessary, however, because the new law is less restrictive, requires less information in the articles, and permits a broader range of corporate arrangements than Chapter 301.

Subdivision 4 sets forth the procedure to be followed in an election under this section. The decision to elect early is a change in the basic "investment contract" of the shareholders. They originally invested in a corporation governed by one set of rules; now, the rules are being voluntarily changed before the corporation is legally required to change. The election is, therefore, a matter for the approval of the shareholders. If the election is approved by a majority of the shares represented at a meeting of the shareholders or any larger number required by the articles, the election shall be effective when a copy of the approved resolution, together with a filing fee, is filed with the secretary of state (see section 1, subdivision 11). From that point on, that corporation will be governed by sections 1 to 125 of this act.

Subdivision 6 permits a corporation formed during the transition period to incorporate under either Chapter 301 or the new act, if the corporation formed for purposes permitted by section 5. Nonetheless, a corporation incorporated under Chapter 301 during this period is deemed to come under the new act on the mandatory effective date.

Subdivision 7 is the chief operative part of this section. It brings all business corporations in the state except those incorporated under Chapter 300, automatically under the new act at 12:01 a.m. on the mandatory effective date, whether or not an election has been filed. The articles and bylaws (see subdivision 5) of the corporation are automatically effective under the new law except for those provisions that are inconsistent with this new act which become null and void, and provisions that were inconsistent with the old law but which are permitted by the new act which become effective, at that time.

After the mandatory effective date, only Chapter 302A may be used for incorporating business corporations, and Chapter 301 is repealed (see section 134).

Corporations governed by this chapter are not subject to certain other chapters and sections of the Minnesota Statutes. The relevant portions of these chapters or sections have been duplicated or rewritten in the new act, or have been omitted because they were outdated or inapplicable. Sections 222.19 and 222.23 relating to railroads never applied to Chapter 301 corporations and do not apply to business corporations formed or coming under this chapter. All of the relevant provisions of Chapter 300 have been integrated into the new act. The remainder of Chapter 300, with the exception of Sections 300.03, 300.04, 300.05, 300.10, and 300.11, which affect utilities will not apply. This act replaces and repeals Chapter 310, effective on the mandatory effective date, so that chapter is clearly not applicable. Those parts of Chapter 316 that are relevant to modern business corporations and that were applicable to Chapter 301 corporations under Minnesota Statutes, Section 301.61 have been included in this chapter or have been omitted as unnecessary. Chapter 317, of course, does not apply to business corporations.

This chapter is a self-contained business corporation law, but reference to other laws such as the tax or securities laws is necessary because of the obvious inability of a corporation law to include such toics within its scope.

Section 3

SOURCE: Ga. Code Ann. Section 22-103(e)(1)

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute addressed this issue.

GENERAL COMMENT:

Under this section, transactions entered into by a corporation before the effective date of an election under section 2, subdivision 4, or before the mandatory effective date if no election has been made, are governed until their completion or during their continuation, by the law in effect at the time when the corporation entered into the transactions, if the transaction originally complied with the then applicable law. However, transactions which were entered into prior to election or prior to the mandatory effective date which did not comply with the applicable former law are not validated by this section or any other section of this act; and the validity of those transactions will be governed by the prior law.

Section 4

SOURCE: Minnesota Statutes, Section 301.59

FORMER MINNESOTA PROVISION" Minnesota Statutes, Section 301.59

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

The effect of this section is to make any changes made in this act by future Legislatures binding upon all corporations governed by this act. Chapter 300 contains no comparable provision: that absence has made it unclear whether that law may be altered in any fundamental way.

Section 5

SOURCE: N. J. Stat. Ann., Section 14A:2-1

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.03

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.03, specifically listed the types of business purposes for which corporations could not be formed under Chapter 301, in addition to prohibiting formation where other chapters required formation under a different corporation law. This section eliminates the specific listing because all of the types of corporations listed in Section 301.03 must, by the terms of other statutes, e.g., Section 47.12, be formed under other chapters. The presumption that the corporation has general purposes unless otherwise stated is also new. Section 301.03 required the purposes to be stated.

GENERAL COMMENT:

This section is worded so that as many Minnesota business corporations as possible may form under the new law. The section excludes non-profit corporations, which must be formed under Chapter 317; banks, trust companies, building, loan and savings associations, and savings banks, which under Section 47.12 must form under Chapter 300, and insurance companies,

which under Sections 60A.07(1), 62C.04, and 62G.07 must form under Chapter 300 or Chapter 317. If these sections are changed this section does not bar formation under this chapter.

Minnesota Statutes, Section 301.03, permitted a corporation to have general business purposes; the new law presumes that it has such purposes. The modifier "lawful" which appeared in Section 301.03 has been eliminated because the determination of what is or is not lawful belongs in section 111, which deals with dissolution by the attorney general. The term "business purpose", means any purpose which is intended to benefit the shareholders of the corporation. Thus a corporation may not operate at a profit, and yet still have a "business purpose".

Section 6

SOURCE: MBCA Section 53

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.03

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

The only notable aspect of this provision is the fact that corporations may not themselves act as incorporators. Consistency with section 24, requires incorporators to be individuals.

Section 7

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.04

CHANGE FROM FORMER LAW: The philosophy behind this section is totally different from the philosophy of Minnesota Statutes, Section 301.04. The new section requires only four basic pieces of information, where Section 301.04 required nine items. The new section also serves more as a checklist than a list of required information.

The new section requires only the name of the corporation, the address of its registered office, the number of shares it is authorized to issue, and the name and address of each incorporator. The old requirements that the articles list the purpose, duration, terms of the shares, minimum stated capital, and the names of the first directors, of the corporation have been eliminated.

GENERAL COMMENT:

The drafting and filing of the original articles of a corporation affords the shareholder, subscriber or incorporator the greatest opportunity to influence the future of the corporation. However, because of a lack of knowledge of the available options or the presumptions that will prevail unless changed in the articles, most shareholders do not tailor the contents of the articles of incorporation. Instead, they frequently use a commercial form for the articles of incorporation.

The purpose of this section is to list applicable rules and available options that can be altered or adopted in the articles or the bylaws. There are rules that are not included in this list; they are not listed because they cannot be altered by any corporate governance document.

The descriptions of the rules or options contained in subdivisions 2, 3, and 4 are cryptic, incomplete expositions of the applicable rules or options, and do not control the language of the sections referred to after the description. The descriptions merely convey the basic effect of the governing sections described, but the incorporators should read and understand the basic governing sections before taking action.

Under this section, it is theoretically possible to incorporate, by filing the information required by subdivision 1, and the filing fee, on a single sheet of paper or even on a postcard. The incorporators should not file this extremely "short-form" of incorporation unless or until they make a full survey of the provisions referred to in subdivisions 2, 3, and 4.

Subdivision 2 lists all of the provisions of this act which may be altered only in the articles; in the absence of any alteration, the presumption set forth in each of those provisions will govern.

Subdivision 3 lists more presumptions that may be changed. These presumptions may be altered in either the articles or the bylaws of the corporation.

Finally, subdivision 4 lists presumptions that will not apply to the corporation unless they are specifically adopted in the articles or, with two exceptions, in the bylaws.

Subdivision 5 provides that the articles may contain any other language or provisions not specifically mentioned in this section, but provisions inconsistent with this act are null and void.

Section 8

SOURCE: MBCA Section 8; Minnesota Statutes, Section 301.05; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.05

CHANGE FROM FORMER LAW: This section permits a business corporation to use "limited" in its corporate name. The secretary of state is given explicit authority to determine what is or is not a "deceptively similar" name under this section. Section 301.05 was silent on that subject. Someone wishing to use a name which is the same as, or deceptively similar to, the name of another corporation now has three ways in which to obtain the use of that name. Under Section 301.05, that use could only occur with the consent of the corporation holding the similar name. Finally, the successor by merger, sale, or other transaction to a corporation may use the name of the original corporation in certain circumstances.

GENERAL COMMENT:

The section ensures that corporations are not mistaken by the public for non-corporations or for other corporations.

Subdivision 1 continues the requirement contained in Minnesota Statutes, Section 301.05, Subdivision 6, that all names be in English characters. This greatly simplifies the task of locating records of the corporation. Subdivision 1 also continues the requirement that the name signify that the entity is a corporation by containing one of the traditional corporate terms ("incorporated", "corporation"). The word "limited" has been added to that group.

The name cannot contain any word which might indicate that the corporation is formed for a prohibited purpose, such as banking. The effect of this clause is that no corporate name may use words which would indicate that it is a bank, trust

company, building and loan association, savings bank, insurance company, cooperative, or non-profit corporation.

The name must be sufficiently unique so that the corporation will not be confused with any other entity having a right to use a particular name in this state. However, there are situations in which the use of a name that is similar to an existing name will be permitted: first, where the corporation holding the existing name gives explicit written consent to the subsequent use of the name; second, where the corporation seeking the "subsequent" use of that name demonstrates to the satisfaction of a court that it actually had a prior right to the use of that name; and finally, if the corporation seeking the subsequent use demonstrates, as set forth in subdivision 1(d)(3), that the entity or person with the prior right to a name is inactive.

Under subdivision 2, the determination of what names are or are not deceptively similar is left to the discretion of the office of the secretary of state. The secretary of state also has the power to make such a determination under section 9.

Subdivision 3 has been included to make it clear that a name may not be used without liability under other laws merely because a name complies with this section. Those other laws may restrict or prohibit the use of that name and should be checked before proceeding to transact business under that name.

Subdivision 4 permits corporations which acquire another corporation or the business of another corporation to continue the use of the name formerly used by the acquired corporation. This permits the acquiring corporation to fully exploit the goodwill purchased along with the assets.

Subdivision 4 is Minnesota Statutes, Section 301.05, Subdivision 8, without change. It provides a remedy for violations of this section.

Section 9

SOURCE: MBCA Section 9; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.05, Subdivisions 3 and 4

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.05, was relatively vague and restrictive, offering the right to reserve names only to those who intended to incorporate in this state under that name within twelve months. The new provision extends the right to reserve a name for an unlimited number of 12-month periods to a broad range of natural persons and corporations.

GENERAL COMMENT:

This section greatly expands the right to reserve names for future use. The practice of reserving a name is only partially validated by our current law. This practice is useful to corporations which are about to change their corporate names, entities which are about to enter this state, and companies which do business in other states who wish to protect their national or regional goodwill from damage from the use of that name in this state by other corporations. In the first two cases, the reservation of a name assures that the name will be available for the exclusive use of the reserving corporation; in the third case, reservation furthers the policy of section 8 by preventing confusion among business entities.

Subdivision 1 of this section sets forth those eligible to reserve names. Those eligible include:

(1) any natural person or other legal or commercial entity engaged in business in this state under the reserved name or any similar name, whether or not that person or entity has qualified to do business under Chapter 303 or filed an assumed name under Chapter 333. Those doing business in a non-corporate capacity may thus reserve names to protect their goodwill;

(2) any person about to form a corporation. This assures that the desired name will be available when the corporation is formed;

(3) any domestic or foreign corporation about to change its name, for the reason stated in (2);

(4) a foreign corporation about to qualify under Chapter 303, for the reason stated in (2);

(5) any person about to incorporate in another state and subsequently qualify to do business in this state under Chapter 303, for the reason stated in (2); and

(6) any other foreign corporation, in order to protect goodwill in this state, even though that corporation may not intend to qualify in this state.

Subdivision 2 provides that the reservation be made by a simple filing with the secretary of state. The reservation is applicable for 12 months and may be renewed for an unlimited number of consecutive 12-month periods by filing a renewal. This extended period during which a name may be reserved makes unnecessary the practice of creating name-holder corporations.

The right to use these reserved names may be transferred from one person to another under subdivision 3 by a simple notice of transfer filed with the secretary of state. Transfer of the name may prove useful in situations where the original applicant becomes a party to a fundamental corporate transaction or licenses the use of its name.

Section 10

SOURCE: MBCA Section 12

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.33, Subdivision 1

CHANGE FROM FORMER LAW: The corporation may, but need not, appoint a registered agent who must maintain an office at the registered office of the corporation. Minnesota Statutes, Section 301.33 was silent on this issue.

GENERAL COMMENT:

Each corporation must maintain a registered office in this state. The first registered office of the corporation must be listed in the articles, see section 7, subdivision 1.

The corporation may also appoint a registered agent upon whom service of process may be made under section 123. The registered agent is required to have an office at the registered office in order that process may be served.

Section 11

SOURCE: MBCA Section 13

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.33,

Subdivisions 2, 3, and 4

CHANGE FROM FORMER LAW: This section provides rules governing the resignation of and the change of business address of the registered agent. Minnesota Statutes, Section 301.33, was silent on this subject. The requirement that duplicate articles be filed with anyone other than the secretary of state when a registered office is moved from one county to another has been eliminated, as has the penalty for failure to file.

GENERAL COMMENT:

Subdivision 1 sets forth the procedure for changing the location of the registered office or the identity of the registered agent. The statement required by this subdivision need not be approved in the same manner that amendments to the articles require, but the statement is regarded as part of the articles after it becomes effective. The statement must contain a slightly more detailed explanation of certain items of information than was required under Section 301.33.

Subdivision 2 makes the resignation of the agent a very simple process. Only the simplest form of written notice to the corporation and the secretary of state is required. The registered office will, however, continue to be the office of the registered agent until the corporation files a new statement of registered office, if the agent is also providing the registered office, in which case the agent may continue to charge the corporation for providing the office until the corporation designates a new registered office. The resignation is effective 30 days after it is filed with the secretary of state. This ensures that all service of process served on the agent before the corporation has a chance to change its agent or office will be forwarded to the corporation.

Subdivision 3 permits the agent who changes business addresses to change the registered office of each corporation represented by that agent without the need for board action by each of those corporations under subdivision 1.

Section 12

SOURCE: MBCA Section 58

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.37, Subdivision 1

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

A flexible mechanism for the amendment of articles is necessary in order to permit the corporation to adapt to changing business or economic conditions.

No list of possible amendments is given; this is a general grant to the corporation of the power to amend. The general grant of power is to ensure that no individual shareholder has "vested rights" in one or more listed items merely because of the possible effect by negative implication of a list of possible amendments.

Section 13

SOURCE: MBCA Section 59

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.37,

Subdivision 2

CHANGE FROM FORMER LAW: Under this section the board may now file amendments to the articles under the authority of section 24 instead of filing new articles which supersede prior articles, avoiding the needless paperwork of that refiling.

GENERAL COMMENT:

There is no reason for continuing to prohibit the correction of errors or oversights in a simple manner. This section provides the corporation with the ability to correct those errors.

Section 14

SOURCE: MBCA Section 59

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.37, Subdivision 3

CHANGE FROM FORMER LAW: The major change created by this is the reduction of the majority required for approval of amendments to the articles from two-thirds of all of the voting shares to a majority of the shares present at a duly held meeting. The class voting provisions formerly in Section 301.37 have been moved to section 15. Individual shareholders or groups of shareholders holding one percent or more of the voting shares may propose amendments under this section. No such requirement was present in Section 301.37. No proposed amendment must be presented to the shareholders if it was considered during the last 15 months.

GENERAL COMMENT:

This section sets forth the procedure for amending the articles after shares have been issued. Amendments may also be made as part of a plan of merger, but plans of merger must be approved by the majority required under section 91, which may differ from the usual majority.

The amendment may be presented to a shareholder meeting either by the board or by an individual shareholder or several shareholders holding one percent or more of all voting shares, but this section does not require that a shareholder-proposed amendment to be presented to that meeting if the proposal was considered at any meeting held within the last 15 months. This avoids the possibility of continuing harassment and repeated conflict which might surround certain shareholder proposals. However, for publicly held corporations, this section is subject to the provisions of Rule 14-a-7 promulgated under the Securities Exchange Act of 1934, where applicable. The amendment will be presented to the next regular or special shareholder meeting if the required ten days' notice can be given before the meeting. There is no limit on the number or types of amendments that may be proposed and considered at any one meeting.

Restated articles that synthesize all prior changes in the articles into a new document are required to be approved by the shareholders before filing. This restatement may also include any amendment making a substantive change in the articles. The restatement must in any case be approved by the holders of a majority of the shares present at the shareholder meeting.

The notice required by subdivision 3 must be given at least ten and no more than sixty days before the meeting, and all holders of voting shares must be given the time, date, and place of the meeting (section 67).

The majority required for approval of article amendments is a majority of the shares present, except that if the amendment would adopt a larger majority, or if it would reduce an applicable larger majority, for approving shareholder action, the amendment must receive the larger of the majority required for passage prior to, or which would be required after, the proposed enactment of the amendment.

Section 15

SOURCE: MBCA Section 60

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.37, Subdivision 3(3)

CHANGE FROM FORMER LAW: This section specifies those instances in which class or series voting is required. The old provision made vague reference to granting class voting in cases where amendments "adversely affect" the rights of shareholders. Series are now also given separate voting rights under this section.

GENERAL COMMENT: Certain amendments are so vital to the terms of the "investment contract" between the shareholder and the corporation that they should be approved by the particular shareholders affected by them, even if those shareholders do not normally have the right to vote at all on the matter. This section lists those amendments. This list is in sharp contrast to the relatively vague admonition of Minnesota Statutes, Section 301.37, Subdivision 3, Clause (3), which required class voting when the rights of the shareholders would be adversely affected by the amendment. Not all of the effects of the listed amendments would be "adverse", but all of the amendments do alter the investment contract. However, the vote of a class cannot by itself approve an amendment. That approval is merely one of the requirements. Other items may also merit class or series voting by the terms of the articles, bylaws, or the terms of the shares under section 68, subdivision 2.

Section 16

SOURCE: MBCA Section 61

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota statutory law has not addressed this issue.

GENERAL COMMENT: This section outlines a detailed procedure for documenting the approval of amendments to the articles. Persons unfamiliar with the usual procedure for filing amendments may safely comply with the statutory policy of full disclosure merely by following the directives of the statute. The section also mandates the inclusion of certain information in the document filed with the secretary of state. The information required in clause (c) may be useful in determining that the vote conformed to section 14. Clause (d) requires information on the manner in which an amendment will be effected, and clause (e) requires that restated articles be marked as such.

Section 17

SOURCE: MBCA Section 63

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No provisions of Minnesota Statutes has addressed this issue.

GENERAL COMMENT:

The amendment is usually effective upon filing with the secretary of state (section 19). This section provides explicit protection for the rights of non-shareholders in the event of amendments. It ensures that amendments will not affect litigation; if a corporation could amend its way out of litigation, the abuse of the amendment process would be obvious. Similarly, amendments approved after a cause of action arises are not relevant.

Section 18

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.06

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

For an explanation of "filed with the secretary of state", see section 1, subdivision 11. No filing with the county recorder is required, contrary to Minnesota Statutes, Section 301.07.

Section 19

SOURCE: New; MBCA Sections 53 and 54

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.06, Subdivision 2

CHANGE FROM FORMER LAW: No Minnesota statute has addressed the issue of effective dates of amendments, although several cases touch upon the subject. This section states a clear rule for the effective date: upon filing; or, for articles of amendment, at such later time, within thirty days of filing, stated in the amendment. Corporate existence under this section commences upon filing the articles, not upon issuance of a certificate, as under Section 301.06.

GENERAL COMMENT: The corporate existence begins when the office of the secretary of state accepts a valid set of articles for filing; that is, when a document containing at least the four items required by section 7, subdivision 1, signed by the incorporators pursuant to section 1, subdivision 29, and accompanied by a $10 filing fee, is delivered, either personally or by mail, to the corporations division of the office of the secretary of state. No further act is required.

Corporate existence is not dependent upon the issuance of shares, Moe v. Harris, 142 Minn. 442, 172 N.W. 494 (1919). Publication of notice of incorporation is unnecessary under this section. Interpretations of prior law indicate that publication may have been a requirement for incorporation, see Rodgers v. National Citizens Bank, 40 F.2d 554 (D. Minn. 1930), even though the statutory language of Section 301.06 makes no such specific requirement.

No alternate effective date for the articles of incorporation is permitted, for two reasons: one, alternative

dates are not necessary because the incorporators have a clear alternative---to delay filing the articles to the time they wish corporate existence to begin. Second, delay in the effective date would cause unnecessary confusion in the administration of the office of the secretary of state and may mislead third parties during the period between filing and the effective date.

Moreover, the effective date should coincide with filing so that there can be no doubt that all subsequent corporate acts are the acts of a de jure corporation. This is important because the doctrine of de facto corporations is inapplicable in this state after the enactment of this act. The simplicity of the procedure set forth for incorporation makes the continuation of this doctrine inappropriate; no publication or other filing with any other official is necessary under this act, only the barest notice, by filing with the secretary of state, is required, and failure to comply with this requirement is inadequate to meet the standard of compliance formerly required under that doctrine. The defense of estoppel, however, has nothing to do with the efficacy of an attempted incorporation, and may apply even where no documents have been filed with the secretary of state.

Although it was formerly the rule that filing with the secretary of state would begin the corporate existence, amendments were never given a specific effective date in the statute. The new provision offers a simple procedure for establishing that effective date. For a discussion of amendment procedure under prior law, see Henry v. Markesan State Bank, 68 F.2d 554, 556-58 (8th Cir. 1934).

The effective date of articles of amendment may be delayed up to thirty days because that delay is unlikely to cause confusion about the existence of the corporate entity; in fact, a delay may well be useful in synchronizing the effective date of an amendment with the date of a particular corporate action, whereas no action can be taken prior to the commencement of corporate existence.

Section 20

SOURCE: MBCA Section 56

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.06, Subdivisions 2 and 3, and 301.13

CHANGE FROM FORMER LAW: No conditions other than the valid filing of valid articles must be met by the incorporating corporation. No amounts need be paid into the corporation, and no other filing is required. Business may be commenced immediately.

GENERAL COMMENT:

This section makes it clear that the filing creates an irrefutable presumption, except as against the attorney general under section 111, that the corporation is and has been incorporated in this state. This section also requires the office of the secretary of state to issue a certificate of incorporation, more for evidentiary purposes than for any other reason. See the comment to section 19 for a discussion of defacto corporations and the doctrine of estoppel.

Section 21

SOURCE: Minnesota Statutes, Sections 301.09, 300.66, and 300.67; MBCA Section 4; N.J. Stat. Ann. 14A:3-1; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.09, 300.66, and 300.67

CHANGE FROM FORMER LAW: This section is a fairly comprehensive, but not necessarily exclusive, list of corporate powers. It greatly expands the powers specifically given to a corporation in order to validate present business practices. No powers granted by Sections 300.081, 300.66, 300.67, or 301.09 have been deleted or limited.

GENERAL COMMENT:

The powers listed in this section are inherent and need not be referred to in the articles, section 7, subdivision 6.

Some of the powers are described in greater detail in other sections of this act (see sections 22, 39, 40, 43 to 51, 52 to 60, 80 to 83) or other chapters of Minnesota Statutes (see Chapter 333). The powers set forth in this section are limited and expanded by the other sections of this chapter and by other statutes of Minnesota and the United States.

The articles may limit any of these powers, as stated in subdivision 1.

Subdivisions 2, 3, 4, 10, 14, 23, and 24 are direct counterparts of powers cited in Minnesota Statutes, Section 301.09, Subdivision 11 is the counterpart of Minnesota Statutes, Sections 300.66 and 300.67. The other powers were only implied under Minnesota Statutes, Section 301.09(6).

Subdivision 2 presumes perpetual duration. Corporations of limited duration are rarely encountered today; moreover, they may be a trap for anyone who does not know of the imminent expiration of that duration.

The power to sue and be sued set forth in subdivision 3 continues, to some extent, even after the dissolution of the corporation (section 118).

Subdivision 4 is limited by statutes which limit the ownership of agricultural lands by corporations other than authorized farm corporations and family farm corporations. See Minnesota Statutes, Sections 500.221 and 500.24, as well as similar statutes of other states, where applicable. This act places no limit on the ability of a corporation to own or deal in property, even if there is no relation between that ownership and the other business of the corporation or, in certain cases, the limited purposes of the corporation.

Subdivision 5 is a necessary corollary to subdivision 4. Although section 97 governs certain sales or transfers, other transfers may be covered by U.C.C. Article 6, Minnesota Statutes, Sections 336.6-101 to 336.6-111 (Bulk Transfers).

Subdivision 6 grants a broad power to deal in securities of all kinds. Shares of a corporation which are reacquired by that corporation are governed by the provisions of section 86.

Subdivision 7 grants a broad power to incur debts and obligations. That power is consistent with modern general corporate purposes.

The power granted in subdivision 8 is not limited to investments consistent with corporate purposes. For example, a corporation formed for the purpose of dealing in real estate may also invest in securities.

Subdivision 11 tracks substantially with Internal Revenue Code Section 501(c)(3) (definition of a form of tax-exempt organization). The early requirement of corporate benefit was assumed in Minnesota Statutes, Sections 300.67 and 300.68, and is not a factor in legitimizing corporate donations under this

section, either.

Subdivision 13 expands Section 300.081 and grants corporations the power to establish and fund incentive and benefit plans, and adds to that power the associated power to indemnify and insure persons entrusted with the care of these plans.

Subdivision 15 permits the corporation to purchase "key-person" insurance on crucial employees, and insurance on shareholders to finance share repurchases at death as part of a buy-sell agreement. The former cushions the blow of the loss to the corporation, especially the small and medium size corporation, of the services of trusted principals, while the latter permits the corporation and the surviving shareholders to exercise some control over the ownership of the shares and the maintenance of corporate stability while delivering the value of the shares to the decedent's heirs or legatees, without draining the corporation of all liquid assets or violating section 85. However, see section 86 for the result of a repurchase.

Subdivisions 16 through 23 merely mention other powers explained in detail elsewhere in the statute and the reader should see the comments for those sections.

Subdivision 24 continues the power to operate under an assumed name.

Subdivision 25 is a general power clause giving the corporation the power to do anything lawful to advance its business. This catch-all provides the corporation with the flexibility it needs to adjust to changing business practices without violating the law.

Section 22

SOURCE: Colo. Rev. Stat. Sec. 7-3-101(c); Nev. Rev. Stat. Sec. 78.065(2); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.09 (3)

CHANGE FROM FORMER LAW: Under this section, it is clear that a corporation need not have a seal and, even if the corporation has a seal, need not use it on any or every document. This section also sets forth specific guidelines for the contents and imprinting of the seal; Minnesota Statutes, Section 301.09 was silent on this matter.

GENERAL COMMENT:

Although corporate seals are not required by this act, and are not required by the corporation statutes of many jurisdictions, some private parties to business agreements with corporations, other laws or regulations, or certain circumstances require that the seal of the corporation be placed on the document.

In order to reduce the cost of owning or using a seal, the section sets forth guidelines that permit drastic reductions in that cost, such as the use of rubber stamps or other, cheaper methods of reproducing and affixing the seal emblem.

In fact, this section permits the use of a standard seal usable by all corporations. A seal meeting the minimum requirement of the second sentence of subdivision 2, that is, one stating merely "Seal" or one stating the name of the corporation and either "A Minnesota Corporation", or "Corporate Seal" may be used by any corporation. A registered agent for several corporations, or counsel for several corporations, need

purchase only one such seal, stating "Seal", which can then be used for each corporation represented.

Morris v. Keil, 20 Minn. 531 (1874) is not overruled by this change in statutory language. That case held that where the signatures on the document are valid and binding, the presence of the seal will be prima facie evidence that the seal was properly affixed; of course, the absence of the seal does not invalidate any document. In either case, the criteria are whether the document is authorized and the signatures are valid under this chapter (e.g., sections 44, 47 and 56).

Section 23

SOURCE: Mich. Corp. Laws Ann., Section 480.1271; MBCA Section 7, (modified); Minn. Stat., Section 301.12.

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.12

CHANGE FROM FORMER LAW: The admonition found in Minnesota Statutes, Section 301.12 that corporations must confine their acts to those authorized in the articles has been removed. The focus of section 301.12 was the assertion of the ultra vires doctrine in court. The focus of this section is a presumption that an act, contract, or transaction is lawful and valid, as far as this act is concerned, regardless of stated power, with three exceptions: First, in a suit by a shareholder for injunctive relief; second, in a suit against officers or directors; and third, in a suit by the attorney general. These exceptions are essentially unchanged from prior law, except that the right of the attorney general to attack the transaction is new. In each of these cases there are certain conditions that must be met; these are also essentially unchanged from prior law.

GENERAL COMMENT:

The purpose of this section is to bring clarity and certainty to the subject of ultra vires, hence the presumption of validity. The three exceptions exist to protect the shareholders and the public from abuses by those alleging to act in the name of the corporation, while protecting any innocent third parties from bearing the burden of the invalidated transaction.

Paragraph (a) provides that the court may award an amount which it may determine equitable, if the court decides that the award is necessary to make whole any innocent party to the contract, including the corporation. Paragraph (b) permits the court to find the actions of corporate personnel who have exceeded their authority invalid. Those persons may therefore be personally liable. Paragraph (b) also allows the court to find the acts of those with knowledge of the lack of power invalid, in which case the transaction may be rescinded.

By the use of the word "representative" in this paragraph we refer to suits brought either as class actions, or by committees of shareholders on behalf of their members.

Paragraph (c) parallels the attorney general's right to wind up and dissolve a corporation under section 111.

Section 24

SOURCE: Ill. Ann. Stat. Ch. 32 Section 157.51 (Smith-Hurd)

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute has addressed this issue.

General Comment:

In those cases where the articles do not name the directors, subdivision 1 gives the incorporators the option of either electing the first board of directors or acting as the directors, with all of the rights, duties and liabilities of directors, until one of the three events listed in subdivision 1 occurs. Until that time the incorporators may take any action this act permits the directors to take.

The events listed in subdivision 1 result in the creation of a self-sustaining corporate governance system, except for the completion of "the organization of the corporation". This vague statement permits the incorporators to take action required in organizing without any risk that the acts will be voided for lack of authority. That phrase should be read to validate as many acts of the incorporators as is possible.

Examples of acts that are organizational in nature are contained in the nonexclusive list in subdivision 2, which also serves as a partial checklist for the inexperienced incorporator. Subdivision 2 also requires that the governing body complete the organization of the corporation at some point in time. No specific penalty is imposed for failure to complete the organization but failure to do so is against the public policy of this statute, which is to encourage the existence of functioning corporate entities, and may be evidence of abandonment, which is a ground for action under section 111 in certain cases.

Section 25

SOURCE: MBCA Section 27; Minnesota Statutes, Section 301.24; New

FORMER MINNESOTA PROVISIONS: Minnesota Statutes, Section 301.24

CHANGE FROM FORMER LAW: The presumption of Section 301.24 that the power to make bylaws is vested in the shareholders, and not in the board, is reversed in this section. The section adds to the list of bylaws that cannot be made or altered by the board after adoption of the initial bylaws the subjects of fixing a shareholder quorum, or prescribing procedures for the removal or replacement of directors. The new provision also provides a detailed procedure for the adoption, amendment, or repeal of bylaws by the shareholders.

GENERAL COMMENT:

Subdivision 1 validates the inclusion in the bylaws of any provision that is not inconsistent with superior law (articles, statutes, state or federal constitution). The corporation is not required to have bylaws, and, in fact, the determination of the roles of the officers, a major reason for having bylaws, has been removed as a reason (see section 47). Any provision permitted in the bylaws may appear in the articles, see section 7, subdivision 5.

Subdivisions 2 and 3 set forth the method to be used in adopting bylaws. Unless the articles explicitly reserve the power to adopt bylaws to the shareholders, the directors or the incorporators may adopt the bylaws. The shareholders always have the power to override actions of the directors or incorporators, in adopting, amending, or repealing bylaws, and it is intended that any action taken by the shareholders may not be changed except by the shareholders. After the initial bylaws have been adopted, only the shareholders may adopt or change

provisions fixing the quorum for shareholder meetings pursuant to section 70, prescribing procedures for removing directors or filling board vacancies pursuant to sections 35 and 36, or fixing the qualifications, terms of office, and classifications of directors, or decrease the number of directors.

Subdivision 3 permits any shareholder holding one percent or more of the voting shares to propose a bylaws resolution, subject to the once-every-fifteen-months limitation applied to article amendments proposed by shareholders. If a shareholder or shareholders makes a bylaw proposal, the bylaw shall be adopted in the same manner that amendments are adopted.

Section 26

SOURCE: Del. Code Title 8 Section 141(a), Section 351; New

FORMER MINNESOTA PROVISION: Sections 301.28, Subdivision 1 and 301.04, Subdivision 7

CHANGE FROM FORMER LAW: Section 301.28 required the business of the corporation be managed directly by the board. This section permits great flexibility in the managerial arrangements and permits the board to delegate the management of the corporation to others, requiring only that the board retain the ultimate responsibility for actions taken pursuant to those arrangements. This section also permits the shareholders to bypass the board of directors on specific matters. Section 301.04, Subdivision 7 required that the names of the first board of directors be listed in the articles of incorporation. This section eliminates that requirement. The first board need not be named at all, but may be elected by the incorporators or the shareholders.

GENERAL COMMENT:

The board of directors continues to be entrusted with the management of the corporation, with few exceptions. First, the corporation may be managed and operated by the incorporators under section 24 until the organization of the corporation has been completed, if the articles fail to name directors, or if the incorporators do not elect directors prior to the completion of the organization. Second, the corporation may be managed by a person appointed by a court to run the corporation, either under sections 79 or 108 of this chapter, or under the Bankruptcy Act or some other statute of this state or the United States. Third, the corporation may be managed by a person or persons designated by the board to manage the corporation. This designation may be made by the board as a matter of inherent power, even though the articles, bylaws or other corporate governance documents may not explicitly refer to this power. The directors remain subject to the standard of conduct set forth in section 44, however, for the actions of those designated persons. Fourth, the shareholders of the corporation may decide certain matters, formerly considered within the sole authority of the board, by unaminous agreement. This agreement may take the form of a unaminous shareholder control agreement described in section 76, or it may take the form of a unaminous vote as described in subdivision 2. In either case, the result is the same; the directors will be not liable for any act approved in that manner, and the shareholders alone will assume that liability.

The third and fourth exceptions are approaches to corporate management new to Minnesota statutory corporate law. Under the third exception, the board is expressly empowered to delegate the management of the corporation among several persons or committees. The duty of oversight and the liability for the actions of those persons or committees remains, however, with the board, which must comply with section 44 standard of

conduct. (For further comment on the use of committees, see the comment to sections 42 and 43.) This power of delegation is consistent with the common law power suggested in Social Security Board v. Warren, 142 F 2d 974, 977, 8th Cir. 1944 (dicta) (no statutory authority required to permit delegation to committee or individuals of the power to make both routine and discretionary decisions) in that it permits complete delegation, and goes beyond the power granted by Del. Code Ann. Sec. 141(a) and referred to in Lehrman v. Cohen, 43 Del. Ch. 222 , 222 A 2d 800, (Sup. Ct. 1966) (delegation of management duties by directors not permitted under the then exsting Delaware Statute) in that it may be exercised without the necessity of a prior explicit authorization.

The fourth exception has been applied in several states to small, closely-held corporations. However, these states have restricted the application of this "bypass" provision to those corporations governed by the special close-corporation statutes which have been drafted for use by what is generally a very narrow class of closely-held corporations. This statute is the first to apply it to corporations generally.

It is apparent that it may not be practical or wise for every corporation to take advantage of this fourth option. Obvious logistical problems make it almost impossible (and imprudent) for the publicly held corporation to use this provision. Those corporations required to comply with Section 12(g) of the Securities Exchange Act of 1934 will probably not wish to use this method because it would entail excessively frequent compliance with Regulation 14A promulgated under that act. Each corporation operates under a unique set of facts which should be carefully analyzed by those who wish to bypass the board.

If the shareholders do govern the corporation either by unanimous vote or by a shareholder control agreement under section 76, the rights, liabilities, and duties of the board are transferred to the shareholders with regard to the acts taken by the shareholders. In addition, the shareholders will also have all the normal rights, duties, powers and liabilities of a shareholder. This dual liability presents a problem only under sections 87 and 88, where liability will be controlled by whichever of the two provisions has the wider scope in the situation. In all other cases, the liability would be the combination of director and shareholder liability. Any unanimous vote of the shareholders approving an act or transaction that must be approved by both the board and the shareholders under the new act is considered to comply with the requirements of the new act.

Bypassing the board will also affect the shareholders by subjecting them to the standard of conduct imposed on directors for any action approved in that manner. In effect, this imposes a fiduciary duty upon each shareholder towards the corporation (and therefore, to other shareholders).

The shareholder will have the right to rely upon the reports of others as provided in section 44.

Minnesota case law contains one case regarding the authority of the board to manage the business, Mair v. Southern Minnesota Broadcasting Corporation, 226 Minn. 137, 32 N.W. 2d 177, (1948) (order to general manager of radio station to take orders from assistant manager held reasonable and discharge of general manager upheld) in which the court stated that "The board of directors has the right to manage the corporation, and when it gives an order the general manager must obey if it is a reasonable order." Section 25 reflects the assumption that the board has the right to fully control the management of the business whether its orders are reasonable or unreasonable. The remedy available against "unreasonable" orders lies in contract law, which is where the Mair case more truly belongs, or in a suit for damages or equitable relief against the director or

directors involved in giving the unreasonable orders.

The former requirement that the names of the initial directors be listed in the articles of incorporation may have been intended to ease service of process on those directors, to identify them for purposes of imposing certain liabilities, and to provide some documentary proof of their authority to act for the corporation. These reasons are no longer applicable since the act provides for service of process on a registered agent or on the secretary of state in section 123. Directors can be readily identified through corporate records, section 74. Finally, the powers of incorporators have been spelled out in detail in section 21.

The practice of including the names of directors is also inconsistent with the provisions on annual reports, which do not require that directors be listed. Moreover, lists of directors are not required in amended articles or restated articles. For these reasons, there is no need to continue this requirement.

Section 27

SOURCE: Del. Code Title 8, Section 141(a); MBCA Section 36, Paragraph 1

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivisions 1 and 3

CHANGE FROM FORMER LAW: This section requires only one director, regardless of the number of shareholders. Minnesota Statutes, Section 301.28 required at least three directors if there were three or more shareholders, or, if there were fewer than three shareholders, at least as many directors as there were shareholders. Both the new and the old provisions permit the number of directors to be prescribed in the bylaws, but this section explicitly permits the articles or bylaws to provide procedures under which the number of directors can be fixed or changed without amending the articles or bylaws.

GENERAL COMMENT:

There is no particular reason to require any number of directors greater than one for the corporation. The old minimum of three had the virtues of being an odd number, thus providing an alternative to possible deadlock, and being greater than one, thus increasing the possibility that the corporation would have a more representative board, especially under cumulative voting. However, although the virtues of an odd number are readily apparent, they may well be something the incorporators wish to ignore. If the incorporators wish to have only one director, and if the subscribers impliedly agree to that by purchasing their shares, there is no apparent interest to be served by mandating any particular minimum number by statute.

Section 28

SOURCE: New

FORMER MINNESORA PROVISION: Minnesota Statutes, Section 301.28, Subdivisions 1 and 3

CHANGE FROM FORMER LAW: This section explicitly permits the articles or bylaws to set forth procedures under which the qualifications may be fixed or varied without amending those documents.

GENERAL COMMENT:

The subject of director qualifications is a matter to be determined by internal corporate governance procedures. Even Chapter 301 recognized that the state had no interest in regulating this matter, except for prohibiting non-natural persons from being directors in order to assure that some natural person will ultimately be accountable for the actions of the corporation. Directors need not be shareholders of the corporation, and need not have any other qualifications.

Section 29

SOURCE: Del. Code Title 8, Section 141(b); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivisions 1, 3 and 4(1).

CHANGE FROM FORMER LAW: This section changes the presumption regarding the length of the term from a one-year term to an indefinite term.

GENERAL COMMENT:

The old presumption of a one-year term in Section 301.28, subdivision 4(1), was supplemented by the statement in subdivision 1 of that section that a director serves "until his successor is elected and has qualified". While this supplemental statement would seem to cure any problem that might be caused by the expiration of the presumptive one-year term when no election for a replacement has been held, other interpretations are possible. This ambiguity, combined with a change in the shareholder meeting requirements to eliminate the "annual" meeting unless such a meeting is called by the shareholders, has led to the end of the one-year presumption. Since, under the old law, the director served until the successor was chosen, that event was made the new standard. Removal, resignation, death, or disqualification are covered by sections 32 and 33 and provide the only exceptions to this standard. A director may be elected to an unlimited number of consecutive or non-consecutive terms.

Section 30

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute has previously dealt with this issue.

GENERAL COMMENT:

This section has several purposes. First, it validates the acts of directors whose terms have expired, but who are still serving. This section applies to both individual directors and entire boards and insulates all acts taken by the board for the corporation and all acts of the officers in implementing those board actions from attacks on the grounds that the authority of the board had expired, that a director whose term had expired had illegally participated in the meeting or voted for the act, or that without such an "illegal" vote the act would not have been approved, and that, therefore, the act itself is illegal. Secondly, this section also expressly validates the acts of the directors in making long-term commitments of any kind which, by their terms, extend beyond the term for which the directors were elected. This includes the appointment of officers for long terms (see sections 48 and 49 for comments dealing with the contract rights of officers and the right to remove officers),

as well as any other long-term commitment such as a lease or any other business contract, obligation or commitment. The section also validates the acts of those officers appointed by the directors where the directors' terms expire before the officers' terms expire.

Section 31

SOURCE: Minnesota Statutes, Section 301.28, Subdivision 4, Clause (a)

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4, Clause (a)

CHANGE FROM FORMER LAW: No change

GENERAL COMMENT:

Compensation of directors is an area where the state has no regulatory interest. The remedy for unreasonable directors' fees is an action for equitable relief under section 79, since an excessive fee may be a violation of sections 44 or 45.

Section 32

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: This provision explicitly validates the practice of electing classes of directors on either staggered or uniform terms, which was implicitly validated by provisions of Section 301.28 which permitted the articles or bylaws to set the terms and qualifications of directors.

GENERAL COMMENT:

This section was adopted after consideration and rejection of the adoption of MBCA Section 37, which allows only a restricted type of classification under that section; the corporation must have nine or more directors, and there may be only either two or three classes. These limitations are too restrictive. Moreover, the Official Comment to MBCA Section 37 gives no reason for limiting the use of this device so severely.

Classified directors are subject to the other sections governing directors to the same extent that non-classified directors would be governed by those sections, and those sections may be varied in the articles or bylaws to the same extent that they could otherwise be varied.

Section 33

SOURCE: Minnesota Statutes, Section 301.26, Subdivision 3, modified

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.26, Subdivision 3

CHANGE FROM FORMER LAW: The only changes in the rules of cumulative voting are in the wording of this section, in the replacement of the 24-hour notice rule with a rule that merely requires notice before the election, and in the mandatory tone of the new language. Notice may now be given to any officer,

not just to the president or the secretary; this is consistent with the flexibility now provided in the officer section.

GENERAL COMMENT:

The statutory presumption in favor of cumulative voting has been retained; the 24-hour notice requirement has been replaced with a requirement of notice before the election. The presumption in favor of cumulative voting was retained because the shareholders of a close corporation would probably bargain for the inclusion of such a provision in the articles of incorporation.

If proper notice of cumulative voting has been given, the mandatory tone of clause (b) does not render any vote void if not cumulated, but the effect of this clause in combination with section 71, subdivision 6, is to automatically cumulate any unspecified vote for the candidate voted for if the shareholder votes for only one candidate. If the shareholder has voted for more than one candidate, the total of the cumulated votes will be divided equally among those candidates. This mandatory language appears in order to ensure that any shareholder who may not be aware of the right to cumulate, or who does not understand that right, will not be deprived of the influence his or her proportional ownership of the corporation would otherwise have.

The formula for cumulative voting to be used under this section is helpful in determining the exact number of votes required for election under this statute. The number sufficient to elect a director varies with the number of outstanding shares. It also varies with the number of directors to be elected. In order to compute the number, the following formula should be applied:

$$A \text{ is greater than } \frac{S \times (D)}{D + 1},$$

where S = number of shares voted in the election of directors,

D = number of directors to be elected, and

A = number of votes required to elect a director.

Section 34

SOURCE: Conn. Gen. Stat. Ann. Section 33-317(d) (West); New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota law has not previously covered this subject.

GENERAL COMMENT:

This provision is intended to make resignations effective at a definite time. The resignation is effective upon delivery because the time of delivery can be readily ascertained in most cases, especially if certified or registered mail is used. Delivery need be made only "to the corporation", because a requirement that delivery be made to particular persons could raise needless questions about the effect of a resignation delivered to the wrong person. "Delivery to the corporation" means mailing or personally delivering to the corporation (see section 1, subdivision 17). A resignation may be effective at any time subsequent to its delivery if such a time is explicitly stated in the letter of resignation, but no resignation may be effective prior to the time of delivery to the corporation.

Section 35

SOURCE: Minnesota Statutes, Section 301.29; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.29

CHANGE FROM FORMER LAW: This section, governing removal of directors, addresses two issues not addressed in Minnesota Statutes, Section 301.29: the power of the directors to remove a director elected by the directors to fill a vacancy under section 33; and the removal of directors by those entitled to elect them in a corporation having a classified board. The new provision also permits the articles or bylaws to vary the procedures set forth in this section.

GENERAL COMMENT:

A corporation may wish to establish its own procedures for the removal of directors, but in the absence of such provisions, a few basic rules apply.

Any director elected by the other members of the board and not by the shareholders is subject to removal by the board, for any reason, if a majority of those other directors vote to remove that director. If the director proposed to be removed has not subsequently been elected by the shareholders, then his authority as a director flows directly from the other directors, and those other directors have the power to end that authority.

Under Chapter 301, classified boards were unknown, and the removal provision, Section 301.29, reflected that lack by providing that "a majority of the shares entitled to vote at an election of directors" could remove a director. However, if a director represents a particular class of shares, the question of removal ought to be decided solely by those shareholders who hold that class. Therefore, subdivision 3 of this section limits the power of removal to the persons who were eligible to elect the director, subject to subdivision 4. Normally, the proportion sufficient to elect and therefore to remove the director will be a majority. There are two exceptions to this: when the articles or bylaws required a greater proportion or number at the time of the election; and when cumulative voting was used to elect that director. If cumulative voting was used, or if cumulative voting has been adopted or re-adopted since the election of the director in question, subdivision 4 applies. That subdivision provides that if shares sufficient to elect the director under cumulative voting if the full board were elected at that time are cast against the removal, the director shall not be removed, even though a majority might be in favor of removal.

In order to calculate the number of votes that must be cast against the removal of the director in order for the prevention of that removal, the following formula is used:

$$A \text{ is greater than } \frac{S1 \times (D)}{D + 1},$$

where S1 = number of shares voted on the question of removal,

D = the total number of directors of the corporation authorized at the time of the attempted removal pursuant to section 27, and

A = number of votes required to avoid removal.

This formula works very well where the shareholders cumulate their votes in the removal process, but where the vote

is taken on a straight, one vote per share basis, the formula must be carried one step further; A must be translated into a number of shares. This is relatively simple, though, if we use the formula:

$$S2 \text{ is greater than } \frac{A}{D},$$

where S2 = the number of shares that must be cast against the removal of the director,

D = the total number of directors of the corporation authorized at the time of the attempted removal pursuant to section 27, and

A = the number of votes required to avoid the removal.

An example which illustrates the use of these formulas might involve a corporation with five authorized directors. There are 500 voting shares of the corporation outstanding, and all are voted at the meeting where the removal is attempted. At the time of the removal, only four directors hold office; one directorship is vacant. Using the first formula, above,

$$A \text{ is greater than } \frac{S1 \times (D)}{D + 1} \text{ or, in this case}$$

$$A \text{ is greater than } \frac{500 \times (5)}{5 + 1} \text{ that is,}$$

$$A \text{ is greater than } \frac{2500}{6},$$

we find that A is greater than 416.667 votes. Now we apply the second formula,

$$S2 \text{ is greater than } \frac{A}{D}, \text{ or}$$

$$S2 \text{ is greater than } \frac{416.667}{5}, \text{ or is greater than 83.334 shares}$$

Therefore, in this example, if more than 83.334 shares are cast against the removal of the director, that director will not be removed.

Subdivision 5 permits all of the members of one board to be removed, by one vote, without the application of subdivision 4; otherwise removal of the board would require an unreasonably high majority. This removal does not eliminate the institution of the board as a corporate governance mechanism.

If directors are removed at a particular meeting, the shareholders may elect replacements during the same meeting. Notice that cumulative voting will be used must be given prior to the commencement of balloting for the replacement.

Section 36(a) gives the board the power to replace removed directors, but it is intended to apply only to those directors removed under subdivision 2. (For further comments see the general comment to section 36.)

This section governs only removal by means of internal governance. Removal of directors by outside powers, such as a court, is covered by section 79. Similarly, the right to

cumulative voting should not be unreasonably impeded; there is little excuse for unpreparedness for cumulative voting at a regular meeting, and no excuse where removal is announced as a purpose of a specal meeting.

Section 36

SOURCE: Minnesota Statutes, Section 301.28, Subdivision 4, Clause (2); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4, Clause (2)

CHANGE FROM FORMER LAW: This section clarifies the majority of the board required to fill vacancies, reduces the proportion required to fill new directorships from two-thirds to a majority, and clarifies the length of the term of a director elected under this section.

GENERAL COMMENT:

This section contains provisions that may be altered in the articles or bylaws. Clause (a)(1) permits the directors to fill vacancies in already existing directorships caused by the death or resignation of a director, the disqualification of a new director, the failure to meet or to continue to meet the qualifications imposed under section 28, or by the removal by the board of directors, under section 35, subdivision 2, of a director elected to his current directorship by other directors. An appointment to fill such a vacancy will be valid if a majority of the directors still in office approve the replacement. Even if the number of remaining directors is less than the number previously required for a quorum, by reason of resignation, deaths, removals or any of the other reasons mentioned above, a majority of the remaining directors is sufficient to approve the replacement. Similarly, a majority of the directors in office prior to the establishment of new directorships may fill those new posts. In either case, the term of the new director shall be an indefinite term which extends until a replacement is elected by the shareholders, or until the director dies, resigns, is disqualified, or is removed by the board. An election for that directorship shall be held at the next regular or special shareholder meeting subject to section 66, subdivision 4, and the newly elected director shall immediately replace any person appointed under clause (a) or (b) of this section.

Section 35

SOURCE: Minnesota Statutes, Sections 301.28, Subdivision 4, Clause (3), 301.28, Subdivision 4, Clause (5); MBCA, Section 144, Section 43, paragraph 2; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4, Clause (3), 301.28, Subdivision 4, Clause (5)

CHANGE FROM FORMER LAW: This section presumes that board meetings will be held at the principal executive offices of the corporation unless the board selects another location, eliminates the notice requirement for meetings already scheduled by the articles or bylaws or by the board, and permits a director to preserve his objection to a meeting called without proper notice even if the director attends the meeting, provided the director attends that meeting solely for the purpose of objecting. It also expands the permissable use of participation by electronic means of directors in board meetings.

GENERAL COMMENT:

The board may meet at any time prescribed by the articles or bylaws or at any time determined by the board under a procedure set forth in the articles or bylaws, and that meeting may be held at any place the board selects. In the absence of selection of a different place by the board, the meetings shall be held at the principal executive office, or at another place fixed in the articles or bylaws, if any. The principal executive office is the most likely site for board meetings due to its proximity to the managerial personnel and the likely availability of corporate information required at board meetings.

This section also permits directors to conduct meetings either partially or totally by electronic means. If notice conforming to subdivision 3 is given to the board members, the directors may hold a conference call meeting completely by electronic means; as long as a quorum is present at the meeting and all participants may hear each other, the meeting and all action taken at the meeting will be valid. An individual director may also attend a meeting that is taking place at a physical location, by telephone or other electronic means, as long as all other participants, whether present in person or by electronic means, can hear and speak to all other participants.

Any director may call a board meeting at any time, upon ten days notice. Notice is given when mailed (see section 1, subdivision 18). Notice of the date, time, and place of all board meetings is required unless the meeting is specifically exempted from notice under this section. The exemptions are listed in subdivision 4. The three listed situations meeting time set by the articles, the bylaws or by the board at a previous meeting have been exempted because the date, time and place are already known to, or should be known to, the directors.

It should be noted that under the last sentence of subdivision 4, a meeting may be announced, and the notice requirement may be avoided, even at a meeting where no quorum exists. That is, if a meeting is lawfully called for a particular day at a particular time, and less than a quorum appears, in person or by telephone, for the meeting, then, even though the meeting could not be lawfully covened and even though no lawful business could be considered at that meeting, the time, date and location of another, later meeting may be announced at that meeting, even in the absence of a quorum. This provision flows from the presumption that every director has a duty to appear at board meetings; a director's failure to appear at a meeting should not be permitted to prevent all corporate actions. Of course, the later meeting must have a quorum at sometime if any action is to be taken legally. For a similar view with respect to the departure of a quorum, see the comment to section 40.

Meetings may also be held on less than ten days notice if all directors waive notice. It may be important to have an emergency meeting of the board for one reason or another. In order to provide flexibility, this section contains liberal waiver of notice requirements. However, corporations relying on oral waivers should recognize that failure to obtain a written waiver may involve a risk in proving that the waiver was given. The oral waiver is a stopgap measure which should be placed in writing as soon as possible.

Attendance at the meeting in question is not a waiver of notice if the director attends solely for the purpose of objecting to the convening of the meeting. The director may remain present for the rest of the meeting without being considered a participant, but the director may not otherwise speak or vote at that meeting.

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: This section permits a director to give advance written consent or objection to a proposal; the concept is new to Minnesota law.

GENERAL COMMENT:

This section permits the following method of counting the votes of absent directors who cannot or do not attend in person or by telephone. A director who wishes to make known his or her views on a relatively concrete proposal may consent or object to that proposal in writing, in advance of the meeting, if the articles or bylaws provide. That consent or objection will count as a vote in favor of or against the proposal or in favor of or against any proposal which, although differing in language from the specific proposal consented or objected to, is "substantially the same or has substantially the same effect". This last phrase means that the two proposals must be so similar in language or in their ultimate results that the actual differences are trivial in comparison with the similarities. The consent or objection does not permit that director to be counted as part of a quorum due to the very limited scope of this provision. The consenting or objecting director should pay careful attention to the risks inherent in this flexibility. The chief concern lies in how much variation from the proposal consented or objected to the consenting or objecting director will accept. If he or she will tolerate little deviation from the language or details of the proposal, any limitations he or she wishes to impose on the consent or objection should be clearly defined in the writing, or the consenting or objecting director should not employ this procedure. If language or detail mean less to the consenting or objecting director than the overall point of the proposal, this subdivision may achieve more flexibility at little or no cost to the parties to the decision.

Section 39

SOURCE: Minnesota Statutes, Section 301.25, Subdivision 7, modified:

PRIOR MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4(6).

CHANGE FROM FORMER LAW: This section permits the articles or bylaws to set at any proportion or number a quorum, whereas Section 301.28 required at least one-third of the total number of directors. This section also permits directors present at a meeting at which a quorum was present to continue transacting business after the quorum is no longer present. Section 301.28 had no such provision.

GENERAL COMMENT:

Minnesota Statutes, Section 301.28 set a minimum of one-third on the range of acceptable quorums. This section eliminates that requirement. It would be wise, however, for a corporation to fix a moderate proportion in the articles or bylaws in order to avoid internal dissension over corporate acts approved in the absence of more than two-thirds of the directors.

The words "majority . . . of the directors currently holding office" make it clear that vacant (but authorized) directorships are not to be included in determining the number necessary for the presence of a quorum. For example, a corporation with nine authorized directors, but three vacancies,

will have a quorum of four, not five.

Directors present at a meeting at which a quorum is present when the meeting is convened may transact whatever business is brought before it, even if a number of directors sufficient to constitute a quorum leave the meeting. One of the duties of being a director is attending meetings until the completion of all business. Those directors who leave early should not be able to prevent the consideration of the remaining business but should instead forfeit their right to debate that business.

Section 40

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4(6)

CHANGE FROM FORMER LAW: This section is slightly more flexible than Minnesota Statutes, Section 301.28 in allowing (and in some cases requiring) higher majorities, but is otherwise quite similar to the last line of Section 301.28, which stated that the act of a majority of the directors present was the act of the board.

GENERAL COMMENT:

This section changes the former language which referred to "acts of . . . directors present at a meeting at which a quorum is present . . . ." This phrase seemed somewhat vague; one could be present at a meeting at which a quorum had been present, but did that quorum validate all of the business transacted at the meeting? That question has been partially answered "Yes" by section 36; to be consistent, the word "quorum" has been removed from this section, and it is sufficient to state that the required majority is "a majority of directors present at a duly held meeting". Again, those who leave a meeting that has been duly called and that has had a quorum in attendance at its convening risk missing the transaction of business by leaving. An intentional attempt to undermine a quorum ought to be ignored and other departures should not be allowed to have the effect of interfering with the business at hand.

Section 41

SOURCE: Minnesota Statutes, Section 301.28, Subdivision 4(7); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4(7)

CHANGE FROM FORMER LAW: The major change which this section makes is that written actions will be effective even though all the directors do not agree to the action, if the articles explicitly permit less than unanimity and if the action does not require shareholder approval, as long as the number of directors signing the action is equal to or greater than the number required for passage at a meeting at which all directors were present. The section also requires that in such cases all directors are to be sent a copy of the text of the approved action, in order to provide them with prompt notice of actions taken in their absence. Under Section 301.28 no such separate notice was required because unanimity, and thus implied notice to all directors, was required.

GENERAL COMMENT:

Three states permit less than unanimous written action by directors under certain circumstances (Arkansas, North Carolina and South Carolina), but no state has a provision giving a corporation an unconditional power to take less than unanimous action without a meeting. However, the lost opportunity for debate among the directors of the action to be taken does not justify withholding the flexibility possible under this provision. It is not always possible to contact all of the directors of the corporation. Sometimes the need for prompt action exceeds the capability to send and have returned a copy of the action and sometimes directors are not sent copies of the consent or themselves forget to return the consent.

Directors should not sign a written action unless they agree with the text of the proposed action as stated in the document presented for the signature of the director because the effect of any signature is to approve that action. Limiting or restricting language following a signature should have no effect and should not be considered; any change in the text of any action or counterpart nullifies the signatures appearing on that counterpart and results in no consent by the directors signing that document. In any case, only that language appearing above the signature of the director is consented to by that signature.

Directors should also be aware of Rev. Rul. 80-29 1980-5 I.R.B. at 5, 1980-1 C.B. 93 which holds that only unanimous written actions will be effective as a substitute for action at a meeting for shareholder approval of qualified stock options under Internal Revenue Code Section 422(b)(1). The rationale of the Revenue Ruling is that, although unanimous written action is acceptable if permitted by state law, because there are obviously no objections to a unanimous decision, the lack of an opportunity for potential objectors to persuade their fellow shareholders at a meeting makes less than unanimous written consent unacceptable. This rationale might also be applicable to written consent by directors, thus directors should try to obtain unanimous written consent for approval of stock options, at least until a relevant case or administrative determination arises to guide directors. Similarly, the fact that less than unanimous consent is legal under this act does not insulate the action taken from the effects of other statutes that may require approval by a larger majority.

A written action is effective at any time stated in the text of the action, or, if no such time is explicitly stated, at the time when actions are signed by that number of directors equal to or larger than the number required for passage at a board meeting under section 37 if all directors were in attendance. Counterparts of a written action, each signed by one or more directors, are to be considered as one written action, see section 1, subdivision 36. Counterparts are viewed as equivalent because the directors are agreeing to a text, not to a particular copy of the text.

Any director who has not consented to the action, as well as each consenting director, is to be sent the text and the effective date of the action as soon as actions signed by a sufficient number of directors have been received. This is necessary in order to notify the directors of the approval of the action, and especially to notify those who were not contacted or who were opposed to the action that the action was approved, so that those persons may discuss the action at the next board meeting or may call a board meeting at which that topic may be discussed.

A written action is to be treated exactly the same as a motion approved at a meeting; to reconsider it, a member of the prevailing side must move reconsideration. Any written action resulting in or authorizing obligations to other persons or entities may be difficult to rescind without breaching the rights of a third party under such obligations.

The remedy for failure to receive notice is not the

invalidation of the action, but, is an equitable action under section 79 for an order that notice be transmitted in the future or for any other equitable relief, or an action under sections 108 or 111.

A written action need not be explicitly designated as such in order to be subject to this provision. Any agreement or proposal submitted to and agreed to in writing by the directors will be considered a written action of the corporation. See Lohman v. Edgewater Holding Co., 227 Minn. 40, 33 N.W.2d 842 (1948) (agreement to sell real property signed by all of the directors held a corporate act under Section 301.28, Subdivision 4, clause 1). To treat such agreements otherwise would be to encourage directors to avoid the consequences of written actions or agreements that bind the corporation. Personal agreements ought to explicitly state that they are personal and not undertaken in the name of the corporation.

This section has no effect on the law of ratification or estoppel.

Section 42

SOURCE: Minnesota Statutes, Section 301.28, Subdivision 4, Clause 8 ; MBCA Section 42; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.28, Subdivision 4(8)

CHANGE FROM FORMER LAW: This section explicitly validates the formation of any number of committees for any purpose or purposes, establishes the quorum and procedures for committees, and fixes the methods of establishment and oversight. It greatly expands the narrow authority of Minnesota Statutes, Section 301.28 which expressly permitted the board to appoint only an executive committee.

GENERAL COMMENT:

Minnesota Statutes, Section 301.28, expressly authorize the board to establish committees other than the executive committee. The authority of the executive committee itself was less than complete, because the statute limited the power of that committee to actions taken between board meetings. This section clarifies and greatly expands the role of committees in Minnesota corporation.

Subdivision 1 expressly permits the corporation to form an unlimited number of committees, each of which may have any or all of the authority of the board. Committees may even have overlapping authority if the board decides to grant authority over a particular matter to two or more committees. This is not necessarily a desirable situation, however, and directors should be cautious in defining the authority of committees.

The power of the board to delegate the management of the business and affairs of the corporation to other persons under section 26 is a power that is the sole responsibility of, and under the sole control of, the board subject to the provisions of sections 26 and 76. Under Minnesota Statutes, Section 301.28, no explicit statement of this power existed except in relation to the executive committee, and the power of committees was vague. Under this section, the board may parcel out the management of the corporation to one or more committees which have the responsibilities listed in the resolutions establishing the committees. The particular language of each resolution is very important, because committees have limited jurisdiction. The absence of explicit authorization to act in a certain area will prevent the committee from exercising jurisdiction unless general language is skillfully used.

The authority of each committee flows directly from the board, which has the power to reverse, modify, or limit the acts of these committees, as well as the liability for a failure to do so, when the best interests of the corporation require such action. The board also has the responsibility to oversee the operations of these committees consistent with section 41.

The activities that may be delegated to committees is unlimited. Although other statutes provide that certain important functions may not be delegated to committees, it is possible to prevent potential abuses by making clear the continuous duty of the board to supervise and correct the actions of the committees, and by making certain remedies available to prevent oppressive committee action. Committees are no more susceptible to use as an oppressive tool by a grasping majority faction than is the board itself. Moreover, members of committees are themselves appointed by a majority vote of the board. The proper remedy for oppressive or unfair committee acts are actions under sections 79 or 108 for violations of sections 44 or 108.

Any natural person, whether a director or a non-director, may serve as a full, voting member of any committee if that person is appointed by the board. This provision permits the corporation to make full use of the talents of non-directors with special expertise, or of directors or officers of related or non-related corporations by appointing them to full membership on committees. The traditional objections to non-directors on committees are that those persons are not necessarily subject to the traditional standards of conduct towards the corporation, and that the tasks delegated to them are tasks that the board should control. This section answers these objections by subjecting committee members to the director standard of conduct, and by making the board responsible in subdivisions 1 and 6 for the oversight and the acts of the committees. The board should take these duties and responsibilities into account before deciding to place non-directors on committees.

Subdivisions 3 and 4 set forth the basic procedures to be used by each committee. The quorum is set by the same procedures used to set board quorums, while the procedures under which the board operates in regard to meetings, absent directors, written actions and valid acts are also applicable to the committee. This section applies board procedures because committees are merely extensions of the board, and should be treated as the board would be treated in the same situation.

Subdivision 5 requires that minutes of committee meetings be made available to directors and members of that committee on request. The minutes are available to directors to enable them to perform their oversight duties, and to inform them of committee actions they may wish to revise, modify or rescind. Members of the committee have access to the minutes for their own reference, of course.

Section 43

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Neither Minnesota Statutes nor recent Minnesota case law contain any reference to the subject covered by this section, which is a developing area of law.

GENERAL COMMENT:

This section explicitly permits the formation of and validates the results reached by committees composed of

disinterested persons formed to determine whether the interests of the corporation will be served by a particular suit on its behalf.

The power of the board to consider whether derivative claims brought on behalf of the corporation should or should not be voluntarily dismissed by the corporation has been questioned recently in the Delaware case, Maldonado v. Flynn, 413 A. 2d 1251 (Del.Ch. 1980), rev'd on other grounds, 417 A.2d 378 (Del.Ch. 1980) (the power to control the management of the board did not include the power to control the course of a derivative suit in a situation where an independent committee of the board, not specifically authorized by any provision of Delaware law, had duly considered the dismissal of and had reached a good faith decision to dismiss, an action on behalf of the corporation against other members of the board for their acceleration of the date on which particular stock options were to be exercised). In Maldonado, the court held that the power to dismiss such an action where the corporation refused to pursue a breach of fiduciary duty claim was not included in the powers of the board to manage the corporation generally.

The control of a suit instituted on behalf of the corporation is part and parcel of the management of the corporation, absent fraud. The continuation of such a suit may not be in the best interests of the corporation and may even have an extremely negative effect upon the business of the corporation and its shareholders.

The rule, suggested by Maldonado, that any shareholder may supersede the board in the conduct of litigation in the name of the corporation is explicitly rejected by this section. Instead, decisions to dismiss such an action, made in good faith by an independent, objective committee, are final and binding on shareholders, directors and officers of the corporation and upon the corporation itself. Abbey v. Control Data Corporation, 460 F.Supp. 1242, 1243-44, 1245-46 (D.Minn. 1978), affirmed, 603 F.2d 724, (8th Cir. 1979), cert. denied, 100 U.S. 670 (1980)(situation similar to Maldonado involving illegal foreign payments instead of advance of exercise of options).

No derivative suit should be dismissed solely because it names directors, officers, or persons involved in the management of the corporation, on the ground that the suit therefore would not be in the best interests of the corporation due to its presumed disruptive or nuisance impact. Committees dismissing suits should be expected to set forth specific, business-related reasons why the suit is not in the best interests of the corporation. Once a decision is reached in good faith, and the reasons are stated, however, that decision is final and binding upon all parties, unless a court finds that the decision was made by a committee that was not independent and objective. If such a finding is made, the court should order the resumption of the suit, and any resumption ought to relate back to the time of filing if the original statute of limitations has expired.

It should be noted that Barrett v. Shanbean, 187 Minn. 430 245 N.W. 830 (1932) is distinguishable from Maldonado. In Barrett, a settlement by the corporation was approved by the court. The plaintiff had a right only to his proportionate share of the corporation (then in liquidation), and had no individual right to redress. However, the court states, in dicta, that "If the directors refuse to sue for secret profits, then relief can be obtained in the appropriate stockholders' action." Id. at 432, 245 N.W. at 831. If all of the requirements of section 43 are complied with, no "stockholders' action" will be allowed and, to that extent, Barrett is overruled.

Section 44

SOURCE: MBCA Section 35

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.31

CHANGE FROM FORMER LAW: This provision retains the basic standard of conduct set forth in Section 301.31, but adds two new concepts to statutory corporation law in Minnesota. Subdivision 2 sets forth the right of a director to rely upon information presented and vouched for by other directors, officers, or employees of the corporation or by persons expert in the area to which the information is relevant in certain situations while remaining within the standard set forth in subdivision 1. Subdivision 3 establishes a presumption that a director present at a meeting assents to board actions taken at that meeting unless he or she dissents from the action or objects to the meeting itself and does not participate in it.

GENERAL COMMENT:

Directors have great powers over the corporation, and few restrictions. The most important restriction on their power is the duty to comply with the standard of conduct set forth in this section.

Although the language of subdivision 1 differs slightly from Minnesota Statutes, Section 301.31, it continues the previously established standard of conduct. While an extensive review of that standard is beyond the scope of this commentary, a few words summarizing subdivision 1 are in order.

Subdivision 1 deals only with directors. The conduct of officers is treated in section 51.

Subdivision 1 continues to protect a director from personal liability if the director, in good faith and with reasonable care in making a decision, makes a business judgment which turns out to be disadvantageous to the corporation. Retention of this protection is essential as an incentive to directors to take corporate risks that may lead to corporate profits and success. This "business judgment" rule, as it is referred to, is made a three-part rule by the addition of the words "in a manner the director reasonably believes to be in the best interests of the corporation." An act must not only meet the first two criteria (good faith and reasonable care) but also the third (best interests). The "best interests" clause simply requires the director to assess the interests of corporation. (Conflicts of interest are dealt with in section 42.)

The last clause of subdivision 1 ("with such care as an ordinarily prudent person . . .") is retained from the former law because it applies a flexible standard to each unique set of corporate facts. The word "diligence" which appeared in Section 301.31 has been eliminated because that concept is subsumed within the word "care".

If a director acts in reliance on the types of information set forth in subdivision 2(a), and that reliance is warranted, then if the decision reached by the director would have conformed to the standard of conduct set forth in subdivision 1 had the information relied on been accurate, the director is considered to be conforming with this section. Accordingly, the director will not be liable, even if the information relied on is incorrect or misinterpreted. However, since the director must actually rely the information in making the decision, no director who is unaware of the information will be permitted to use the safe harbor of subdivision 2.

This right to rely appears in the new act because a director of most modern corporations cannot personally ascertain all of the facts necessary for proper management. In addition, primary responsibility for certain areas of the operation of the corporation may have been delegated to a committee under section 42. Experts may be needed to analyze a certain set of

circumstances. "Expert" is not limited to any class of licensed or unlicensed persons, but should be construed broadly to mean any person who could reasonably be expected to have special or superior knowledge. An expert's information must be within his or her field of "competence" in order for the director to rely on the information; in contrast, a director need only have confidence in the ability of the committee that presents information under clause (c) to rely upon the report of the committee.

Subdivision 3 provides directors with an incentive to critically debate and decide management questions. Active involvement in the management of the corporation, where appropriate, is part of a director's obligation to the corporation under subdivision 1. The position of director liability on a director who does not expressly dissent will discourage directors from silently acquiescing in corporate mismanagement because those directors will be accountable for that mismanagement.

Special Comment:

Although this section does not mention the standard of conduct for officers or shareholders, a few words on the subject of conduct generally might be useful.

The conduct of directors and officers with respect to the corporation has been part of the Minnesota Statutes for almost fifty years. The shareholders also have a right to a certain standard of conduct. Young v. Blandin, 215 Minn. 111, 116-17, 9 N.W. 2d 313, 316 (1943), Chicago Stadium v. Scallen, 530 F.2d 204, 207 8th Cir. (1976), Honigman v. Green Giant Co., 208 F. Supp. 754, 758 (D. Minn. 1961). Promoters (and perhaps incorporators) must meet a similar standard. Earle R. Hanson & Associates v. Farmers Co-op Creamery Co., 403 F.2d 65, 70 (8th Cir. 1968). Majority shareholders may also be required to conduct themselves in certain ways with respect to other shareholders, Rockler & Co. v. Minneapolis Shareholders Co., 425 F. Supp 145 at 149 (D. Minn. 1977). These standards are not specifically defined in this statute, because the courts must be free to continue to make determinations of the applicable duty on the basis of the facts in each case.

Section 45

SOURCE: Cal. Corp. Code Section 310 (West)

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No prior Minnesota statute has dealt with the validity of transactions between corporations and certain interested persons. There is Minnesota case law on the subject of corporate opportunity, but this section does not deal with that issue.

GENERAL COMMENT:

This section does not replace the existing case law in this state with regard to corporate opportunity. See Miller v. Miller, 301 Minn. 207, 222 N.W. 2d 71 (1974); A. C. Petters Co. v. St. Cloud Enterprises, Inc., 301 Minn. 261, 222 N.W. 2d 83 (1974); Diederick v. Helm, 214 Minn. 483, 14 N.W. 2d 913 (1944). Instead, it deals solely with apparent or actual conflicts of interest inherent in transactions between the corporation and the director or any other organization in which the director participates as a director, officer, or other representative or has a material financial interest. Transactions of this sort will not be void or voidable if the director establishes that the transaction is fair or if certain disclosures are made and certain consents are received. This

section states explicit standards for meeting those requirements. This does not mean that all transactions that do not comply with this section are automatically void or voidable, and, the courts are free to deal with those transactions on a case-by-case basis.

This section provides three methods of validating the transaction because one of these methods may be more convenient than either of the other two. In each case, the end result is the same; there is some assurance that after all of the facts have been disclosed, the shareholders or directors have (or in the case of (a), reasonable shareholders or directors would have) approved the transaction.

The standard in subdivision (a) reflects the decision in Fountain v. Oreck's, 245 Minn. 202, 207, 71 N.W. 2d 646, 649 (1955), that the transaction will be upheld if the director has dealt fairly with the corporation and if the terms of the transaction are fair and reasonable; Swenson v. G. O. Miller Telephone Company, 200 Minn. 354, 359, 274 N.W. 222, 225 (1937). However, it may be necessary to bring the matter to court in order to obtain a definitive answer to questions of fairness and reasonableness. In such a case the other two methods provided by this section may be much more conventient for all parties.

Paragraph (b) permits the shareholders to validate the transaction by informed consent. The majority required for validation is a majority of the outstanding shares, but the shares of an involved director shall not be voted. Thus, a director owning a majority of the outstanding shares cannot use this method, since a majority of the outstanding shares would be prohibited from voting. This procedure is consistent with and provides for a more specific safe-harbor than the procedure approved in Lake Park Development Co. v. Paul Steenberg Construction Co., 301 Minn. 396, 276 N.W. 651 (1937) (shareholder acquiescence in conflict of interest transaction held approval by shareholders). Full disclosure of all of the material facts is required, and the failure to disclose any material fact will prevent the director from using this subdivision to obtain approval.

Paragraph (c) permits the board, or a committee appointed by the board, to approve the transaction, after full disclosure. The board or the committee members must comply with section 44 in approving the transcton. If the standards set forth in section 44 and in this paragraph are met, the fairness of any transaction so approved is conclusively presumed. If those standards are not met, the transaction may be attacked as void or voidable, and the approving directors may be liable for approving the transactions.

Subdivision 2 permits the board to set its own compensation without further approval under this section. These transactions are not considered to involve a conflict of interest and need not be ratified under subdivision 1.

Subdivision 2(b) attributes the financial interests of the immediate relatives of the director to that director. Transactions with corporations in which these relatives have a material financial interest are likely to benefit the economic unit from which the director derives or appears to derive some benefit. Thus, in order to avoid even the appearance of a conflict of interest, transactions involving these persons or organizations in which they have a material financial interest are subject to this section.

This section prohibits the inclusion of an interested director or shares owned by that director for purposes of determining the presence of a quorum and approving the transaction. Prior case law is inconsistent; Fountain v. Oreck's, 245 Minn. 202, 71 N.W. 2d 646 (1955) (director counted for a quorum at meetings where he was paid a bonus for his

duties as general manager) permits interested directors to be part of the quorum, while Goldie v. Cox, 130 F. 2d 695 (8th Cir. 1942), and In re Fergus Falls Woolen Mills Co., 41 F. Supp. 355 (D. Minn. 1941), hold that such participation is impermissible at least in bankruptcy situations. This statutory provision settles the inconsistency.

Section 46

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.30, Subdivision 1

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.30 required a president, secretary and treasurer, although any two of these (or any other) offices could be held by one person. This section does away with these requirements and requires only that some person exercise the powers and fulfill the duties listed in section 47. One person may exercise all of those powers.

GENERAL COMMENT:

Many modern corporations no longer have persons holding the title of president, secretary, or treasurer. Instead, many corporations now have chief executive officers, chief operating officers, chief financial officers, and other "chiefs." Some corporations have arrangements where there is a chairman of the board and a management group of operating officers. Other corporations have different structures. In any case, the former provision was too restrictive. The new proposal is very flexible, but it insures that the essential functions of corporate executive and operating offices shall be carried out. This flexibility is possible in great part due to the more concrete duties laid out in section 47 and in the rules governing elections set forth in section 50.

Section 47

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.30, Subdivision 2

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.30 left the determination of the duties of officers to the bylaws or to the board. That law imposed no duties. This section provides some duties but gives the board the ability to change those presumptions in the articles, or bylaws.

GENERAL COMMENT:

This section sets forth these duties of officers with the informal, closely held corporation in mind. There is frequently no explicit assignment of duties in a small corporation. There may not have been an election of officers (for a discussion of that situation see the General Comment to section 50). In the absence of such an assignment, this section lists the duties and responsibilities of those occupying or performing the principal functions of the offices of chief executive officer (CEO) and chief financial officer (CFO). This list may be relied upon by the officers themselves, shareholders, and third parties. This list is, of course, only a very limited statement of the responsibilities of the officers, and this section does not limit the powers or responsibilities as determined by agency law or as varied from this section in the articles or bylaws, or by

the board, pursuant to subdivision 1, but it will suffice as a partial guide to the small corporation.

Subdivision 2 sets forth some of the duties of the CEO. The CEO has the power to generally manage the business. The CEO may run the ordinary, day-to-day affairs of the corporation and bind the corporation in the ordinary course of business. The CEO may, unless prohibited pursuant to section 53, delegate this power to another person acting as general manager pursuant to that section, but the CEO remains ultimately responsible for the actions of that person. Whether the delegate has the inherent power to bind the corporation by virtue of the delegation depends upon the scope of the delegation. The courts may expand the inherent authority of the CEO to bind the corporation in the ordinary course of business where they deem such expansion appropriate. This section does not limit any authority derived from other sources.

The CEO also generally presides at board meetings, a duty generally inherent in the position.

The CEO, as part of the management of the business, must also see that board actions are translated into effective corporate actions. The specific duty is stated in clause (c), in order to make it clear that board actions cannot be ignored.

Clause (d) gives the CEO the authority to execute instruments and incur obligations. This authority is part of the management authority; the instruments or obligations referred to are those which have to do with the ordinary course of business. This clause does not limit the authority of the CEO in other situations, where courts find that the CEO has the inherent authority due to board or shareholder acquiescence or custom, see Lewin v. Proehl, 211 Minn. 256, 261, 300 N.W. 814, 817 (1941); Schlick v. Berg, 205 Minn. 465, 286 N.W. 356 (1939), or through a judicial expansion of inherent authority.

Corporations frequently deal with organizations that require certification of proceedings or resolutions, most commonly banks. Section 77 requires corporations to maintain certain records. In order to fix the responsibility for these record-keeping procedures, the duty of maintaining and certifying board and shareholder records is assigned to the CEO, while the CFO is assigned responsibility for financial records generally. The CEO may delegate this duty under section 53, subject to prohibition under that section, but the CEO remains responsible for the performance of those functions. Where the bylaws provide for and explicitly assign this duty to a corporate secretary or another officer, the CEO is relieved of this duty.

Naturally, the board may add duties to those listed here as it sees fit. Each corporation operates under a unique set of facts which may require different duties.

The duties of the CFO are set forth in Subdivison 3. These are all fairly traditional duties.

Both the CEO and the CFO may also appoint persons to subordinate offices and delegate some or all of these duties to those persons under section 53.

The provisions of subdivisions 2 or 3 relate to the express authority of the officers. The real authority of an officer almost always exceeds his express authority. This real authority may be (a) actual (express or implied), or (b) apparent, or (c) derived from ratification.

Express authority stems from statutes, the articles, or, most frequently, the bylaws and resolutions of the board of directors.

Implied authority is often called "inherent" or

"presumptive" authority or authority "by virtue of office". It may result from general custom or from the practice of the particular corporation, or it may be incidental to express authority. See, e.g. Aimonetto v. Rapid Gas, Inc., 80 S.D. 453, 126 N.W. 2d 116 (1964) (power to write check incidental to power to purchase). Early cases tended to hold that the president had no authority by virtue of his office to bind the corporation, but later cases recognize the authority of the president to act by virtue of his office for the corporation in its ordinary business transactions. When the president acts as general manager, he enjoys the implied authority inhering in the manager. Lewin v. Proehl, 211 Minn. 256, 251, 500 N.W. 814, 817 (1941).

A general manager has implied authority to make any contract or to do any other act appropriate in the ordinary business of the corporation. Foley v. Wabasha-Nelson Bridge Co., 207 Minn. 399, 401, 402, 291 N.W. 903, 905 (1940) 1 Restatement, Second, Agency, Section 73 (1958), 2 Fletcher, Corporations Section 667 (Perm. Ed.). No formal appointment is necessary; the fact that a person acts as the general manager is sufficient to clothe him with this authority. This principle partly explains the modern cases broadening the implied authority of chief executive officers and the occasional case recognizing unusual implied authority in other officers.

Apparent authority, sometimes called ostensible authority, may or may not involve principles of estoppel. Where a corporation clothes an officer or agent with apparent authority, which is reasonably relied upon in good faith by third persons, the corporation is estopped from denying such authority. Where there is apparent authority, the absence of actual authority, whether express or implied, is immaterial. See, e.g. Temple, Brissman & Co. v. Greater St. Paul Corp., 189 Minn. 236, 248 N.W. 819 (1933) (by authorizing president to pay for two prior audits, board authorized subsequent payments for audits ordered by president.)

Unauthorized acts of officers which could have been authorized in advance by the board of directors may also be ratified later by the board. Ratification relates back to the time of the act. It is equivalent to a prior authority, subject to possible intervening rights of third persons. Ratification may be either express, such as resolution by of the board of directors, or implied. An implied ratification usually results from acceptance of benefits with knowledge of the facts. The circumstances under which the knowledge of a director or officer should be imputed to the corporation are not always clear.

Section 48

SOURCE: MBCA Section 50

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.30, Subdivision 1

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.30 speaks of appointing the additional officers, which implies only one method of choosing officers. This section refers to electing or appointing officials; actually, any sort of board action naming officials will be valid. The section also explicitly allows the board to set the terms of the officers.

GENERAL COMMENT:

This section is intended to be read as broadly as possible. The board is the best judge of how the corporate executive structure should be arranged, and this section allows it to take almost any action with regard to establishing that structure. Officers chosen under this section may delegate

their duties to persons functioning in subordinate offices under section 53, in the absence of a prohibition under that section.

Section 49

SOURCE: MBCA Section 50

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.30, Subdivision 1

CHANGE FROM FORMER LAW: This section gives the person holding more than one office the express authority to sign documents in both capacities, where required, by one signature if the document indicates each of the capacities in which that person signs the document.

GENERAL COMMENT:

This provision reiterates the ability of the board to shape the scope of responsibilities of the CEO, the CFO, and all other officers. Any person may hold or perform the functions of any number of offices. This section also validates the signing of documents by officers in more than one official capacity. Any document that must be signed by more than one particular officer will be valid and binding if the officer signing the document holds all of those positions, and if that officer indicates in the document that he or she is signing the document in more than one capacity by clear reference to those capacities.

Section 50

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota law has not previously addressed this subject.

GENERAL COMMENT:

Boards of some corporations fail to elect or appoint officers to to principal offices, i.e. chief executive officer (CEO) and chief financial officer (CFO). In other cases, an emergency may occur and some other person may have to assume the duties of the CEO or CFO. In either situation, there is no reason for a corporation, especially a small corporation, to be without either of these two officers. The functions of these two offices are sufficiently important to corporate management to warrant treatment of the persons exercising those functions as officers. This section allows such a person to exercise all of the powers inherent in that office, and subjects that person to the duties and liabilities of that position.

The application of this section is limited to the CEO and the CFO because they are the only officers that this statute requires a corporation to have, and because many small corporations can be managed, at least for some period of time, without any other officers.

The registered office, rather than the principal executive office, will be the key office of the corporation for all purposes in such cases, because the shareholders cannot be expected to know that a certain person has been functioning as the CEO, to know the location of that person's office, or to depend upon that location as the site of any shareholder meeting or as an address which notice may be sent. See section 1, subdivision 17, and sections 65 to 67. A shareholder calling a

meeting has the right to know that that meeting will be held at a known place, such as the registered office, and not at some location determined by the functions performed by officers not chosen by the board.

Section 51

SOURCE: MBCA Section 51; New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute has explicitly addressed this issue.

GENERAL COMMENT:

This section concerns itself with the creation and validity of the contract rights if any, of the officers of a corporation. It specifies that an election or appointment to an office for a fixed or indefinite term is not an employment contract for that term. In order to secure contract rights, a separate employment contract must exist. The contract is valid if the board decides that the contract is in the best interests of the corporation. This does not mean that a contract will be void or voidable if it is later found not to be in the best interests of the corporation; if the board decided that the contract was in the best interests of the corporation at the time the contract was approved, it will be valid and enforceable. The last sentence merely makes explicit the authority of the board to bind the corporation to an employment contract for a period longer than the terms of the current board members.

Section 52

SOURCE: MBCA Section 51; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.30, Subdivision 3

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.30 did not deal with resignation or vacancies, but governed only removal. It made no provision for the effects of shareholder control agreements. The new provision expands the scope of the statute to cover resignation and vacancies, and expressly validates provisions of shareholder agreements containing special rules in the areas covered by this section.

GENERAL COMMENT: Subdivision 1 provides specific rules for the resignation of an officer and the effective date of that resignation.

Officers may resign by giving written notice of their resignation to the corporation. "To the corporation", means personal delivery to an officer, agent or director of the corporation, personal delivery or mailing to either the principal executive office or to the registered office, or personal delivery or mailing to the registered agent of the corporation. A resignation is effective immediately upon delivery of that notice to any of these persons or places, unless a later time or contingent circumstance from which a time can be calculated (e.g., "Two weeks after a qualified successor is elected to replace me.") is stated in the text of the resignation.

The resignation, when effective, immediately relieves the officer of liability for acts occurring after the effective date.

Delivery is the key event due to its easily provable nature (registered mail, affidavits of service, etc.). However, if the chief executive officer (CEO) or the chief financial officer (CFO) gives written notice of resignation, but continues to perform the functions of the office, the written notice of resignation is effective for the officer's position as an elected or appointed officer, but the person still will be deemed an officer under section 50, and all of the liabilities of that officer continue to apply despite the attempted resignation.

Subdivision 2 permits the board to remove an officer with or without cause by a simple majority, in recognition of the fact that an officer has no fixed right to his position as an officer. Although the officer may have an action for damages under a valid employment contract with the corporation for removal without cause prior to the expiration of the contract, such a contract must be established independently of the election or appointment to the office.

Of course, the board may not have the power to remove an officer if a shareholder control agreement under section 76 has mandated that a certain person shall hold a certain office. Unless the shareholder agreement is modified, the board has no power to remove that person from office.

Subdivision 3 merely states that vacancies may be filled in a variety of ways, including by implication, pursuant to section 47.

Any office filled under this subdivision is filled for the remainder of the term, if any, for which the original officer was elected. If the term was indefinite, or if no term was specified, the vacancy shall be filled without reference to the term.

Section 53

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Prior Minnesota law did not address this issue.

GENERAL COMMENT: This section explicitly gives the elected or appointed officers the power to assign duties to persons filling subordinate positions, without board approval. The officer remains liable for damages to the corporation for the actions of those persons if the officer has violated the standard of conduct set forth in section 51 in the course of delegating duties to, or failing to supervise, those persons. However, the articles or bylaws, or a resolution of the board may prohibit the officers from delegating some or all of their duties.

Section 54

SOURCE: MBCA Section 35; Minnesota Statutes, Section 301.31

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.31

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

Officers are subject to much the same standard of conduct as are directors, with few differences. The standard is not

automatically met, as in the case of directors, by reason of reliance upon information provided by others, unless it is subsumed under the circumstances within the phrase "ordinarily prudent person in a like position under similar circumstances". An officer clearly has no right simply to rely on information provided by another person if the matter relied on is within that officer's own area of direct responsibility. On the other hand, that officer may have a right to rely on others if the matter is outside the scope of the relying officer's responsibility. Because the scope of an officer's responsibility can vary greatly depending upon his or her position and the corporate executive structure, it is preferable to permit flexible measurement of an officer's compliance with the standard of conduct by reference to the particular circumstance.

Section 55

SOURCE: Minnesota Statutes, Section 301.14, Subdivision 5; MBCA Section 15, Paragraph 2; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.04, Subdivision 5 and 301.14, Subdivisions 1 to 5

CHANGE FROM FORMER LAW: This section explicitly grants the board the power to authorize the issuance of shares and to fix the rights and privileges attached to those shares. The new provision also presumes, in the absence of different provisions in the articles, that all shares are of one class and series and that all shares have a fixed one cent par value for tax purposes. Otherwise, the section leaves current law unchanged.

GENERAL COMMENT:

This section maintains the broad flexibility in the area of fixing the rights of shares currently granted to the board by Chapter 301. In fact, it somewhat broadens the power to fix those rights. In Section 301.14, the board could fix the rights and privileges of shares by resolution only if authorized to do so by the articles. The board automatically has that power under subdivision 2(b) unless the articles deny or limit that power or have already fixed those rights.

Subdivision 1 gives the board the power to authorize the issuance of shares, securities, and rights to purchase. The only restrictions on that power are those set forth in subdivision 2, the restrictions on issuance imposed by the articles, and the maximum number of shares authorized by the articles. Within those limits, the board has an absolute right to proceed to authorize and issue shares as and when it sees fit. The decision to bring new capital into the corporation is an integral part of the management of the corporation and, except for the limtations noted, ought to be completely controlled by the board.

Subdivision 2 creates statutory presumptions in three areas: classes and series; rights and preferences; and par value for tax purposes.

Subdivision 2(a) makes all shares of a corporation part of one class and series unless the articles provide otherwise. This section reflects an effort to lessen the differences between classes and series. The unitary class requirement assures that small corporations, which are likely to have simple articles, will not accidentally run afoul of the Internal Revenue Code Subchapter S requirement that an electing corporation have no more than one class of shares. Internal Revenue Code Section 1371(a)(4). It also gives minority shareholders of those corporations a certain amount of protection, because in the absence of a provision in the

articles, their preemptive right under section 58 cannot be circumvented by the issuance of another class of shares unless the articles are amended to authorize, or empower the board to authorize, an additional class. Of course, any corporation can circumvent the safeguards offered by these provisions by ensuring that the original articles authorize the board to create any number of classes or series in the hope that investors will invest in the corporation despite the greater difficulty in maintaining their proportional investment in the corporation that such a provision might create.

Subdivision 2(b) gives the board the full power to set the rights and preferences of all shares of any particular class or series. All shares within the same class or same series should have equal rights and preferences; if there are differences in rights and preferences, the shares may actually be of two different classes or series, even if designated as shares of the same classes or series. However, the board cannot override those provisions in the articles, if any, fixing those rights and preferences. If the articles are silent with respect to one or more particular rights or preferences, the board may fix those rights and preferences. In the absence of all such provisions in the articles or any board action fixing the rights and preferences, all shares will have equal rights and preferences, and all shares will be voting shares each having one vote, see section 71, subdivision 3. Again, the capital structure is ordinarily a matter within the discretion of the board, since it may from time to time be necessary to issue shares with various rights without excessive statutory restrictions by this act.

Subdivision 2(c) fixes the par value of shares at one cent per share for tax purposes in the absence of any provision in the articles or in the terms of already outstanding shares setting a different par value. This provision is included to satisfy the foreign corporation franchise tax requirements of some states which are often based upon the number or par value of the outstanding shares. This statute has eliminated the former, outmoded concepts of par value, capital surplus, paid-in surplus, earned surplus, and stated capital as operative concepts, although a corporation may retain these standards under this statute if it so wishes. However, the franchise taxes imposed by some states are based solely on par value or upon some combination of one or more of these former concepts. Thus, for those corporations whose shares have no par value, the statute provides a statutory presumption of a par value of one cent, so that other states can determine the franchise taxes of those corporations. This subdivision also permits the board to set any par value it deems necessary for purposes of any other statute or regulation.

Subdivision 3 describes the manner in which the board may exercise the powers granted by subdivision 2. Actually, the board need only approve a resolution fixing the numbers or types of classes or series, the rights or preferences (including voting rights) of those shares, or the par value of those shares. After the resolution is approved, a copy of it and a statement or affidavit certifying its adoption must be filed with the office of the secretary of state, see section 1, subdivision 11. The shares affected by the resolution may then be issued; they may not be issued until that filing.

Once the board has adopted a resolution under subdivision 2 to fix the number of classes and series, rights and preferences of shares, or the par value of shares, that resolution is part of the investment contract. Even though it is not technically an amendment to the articles, it is to be treated as if it were for purposes of inspection under section 77. The terms of the resolution may not be altered except in the manner set forth for amendment of the articles in sections 14 to 19. This promotes certainty and permits the shareholders to rely upon the resolution and may stimulate necessary consideration of the designations, rights and preferences, or par value of shares.

The more permanent the decision is, the more serious the consideration of that decision will be.

Subdivision 4 is merely a nonexclusive guide to the types of rights and preferences that a share may be given. Section 301.04(5) restricted the ability to fix or alter rights and preferences to six categories listed in the last clause of that section, but this section does not limit the types of rights and preferences that may be determined under this section.

Section 56

SOURCE: N.Y. Bus. Corp. Law Section 503; MBCA Section 17; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.17

CHANGE FROM FORMER LAW: This section provides for a six month period during which every subscription is irrevocable, regardless of whether the corporation has been incorporated or is still in the pre-incorporation period. Minnesota Statutes, Section 301.17 provided two different periods, depending upon whether the subscription agreement was entered into before or after the issuance of the certificate of incorporation. This section does not require formal acceptance of the subscription by the board or by the shareholders and does not equate acceptance with an issuance or "allotment" of shares. The new payment provisions require that payment for all shares of the same class or series, if not governed by the subscription agreement, must be requested at one time and in the same proportion, unlike the old provision which permitted the board to demand payment from individual investors, inferentially at different times and in different proportions. The investor still has 20 days after the request within which to pay the amount due. The new section eliminates the old lien provisions and streamlines the collection procedures by referring those problems generally to the laws of contract and secured transactions. The new collection procedures provide that after the forfeiture of the shares for for failure to pay the amount due, the corporation may attempt to sell the shares governed by the subscription, in which case the subscriber would receive the proceeds in excess of the sum of the amount remaining to be paid under the subscription agreement due and the expenses of the sale, or, if no purchaser is found, the corporation may rescind the subscription, in which case the corporation shall refund the amount actually paid for the shares. In either case the corporation may retain ten percent of the subscription price.

GENERAL COMMENT:

The old subscription section was far too detailed. Those details duplicated the operations of many areas of law which, though important to a subscription, have no other direct relevance to corporate law. The new provision leaves the consequences of non-payment largely to areas of the law governing contracts, secured transactions, or bankruptcy, or to the common-law. This dependence on other areas notable is because the other parts of this act emphasize detail and full discussion of the applicable procedures. Only rarely did the old law provide the detail required by the old subscription section.

Subdivision 1 provides that no subscription agreement is enforceable unless signed and in writing. The signature requirement is new and was adopted in order to ensure that oral subscriptions, always hard to prove, are no longer used. The signature requirement adds certainty to the subscription document.

Subdivision 2 makes all valid subscriptions irrevocable for six months from the day the subscription agreement is signed

unless the terms of the subscription agreement permit, or all the subscribers or shareholders consent to, an earlier revocation. Under this section, no acceptance is necessary in contrast to the old statute. "Formative" or pre-incorporation subscriptions are included in this rule and are treated as any other subscription would be treated. Subscribers may be released from the agreement by the terms of the agreement for obvious reasons or by unanimous consent because the contract is a contract among shareholders and subscribers, and unanimous consent acts as a total release from any obligation under the contract.

Subdivision 3 allows the subscription to set the payment timetable. An agreement which provides only that the subscription is payable upon any one date or at a particular time, e.g. "Two weeks after the incorporation is filed", is payable in full on that date or at that time.

If the agreement is totally silent as to the payment date this section allows the board to fix the payment time or times. The board is in the best position to know when additional capital is required. However, in order to assure that this device is not used to force particular subscribers to pay at times not required of other subscribers each payment must fall in equal proportions upon all subscribers to shares of the same class or series.

Subdivision 4 provides for a simpler procedure for handling forfeitures. The corporation still has the option of proceeding either to collect the debt by all available legal or equitable remedies, or to declare the subscribed-for shares forfeited. However, the corporation cannot declare the shares forfeit until the twenty-first day after written notice of a demand for payment has been given (see section 1, subdivision 17). If payment has not been tendered to the corporation by that day, the corporation may declare the forfeiture without any additional notice to the subscriber.

At this point the corporation may choose between either of two courses of action: it may return to the subscriber that portion of the purchase price paid prior to the forfeiture in excess of ten percent of the entire price agreed upon in the subscription agreement, or it may attempt to sell the shares to a third party and retain ten percent of the original purchase price.

If the corporation chooses to sell the shares, it must sell them for no less than the unpaid amount plus the expenses created by the sale. Any amount received for the shares in excess of the sum of the unpaid amount, and the expenses of the sale is to be paid to the subscriber, but the subscriber cannot receive more than the amount actually paid to the corporation for those shares. No delinquent subscriber should profit by that delinquency, even if the market value of the shares has increased before the declaration of the forfeiture. If the corporation cannot find a willing buyer at this minimum price, it may either proceed to collect the debt under other laws or return the amounts received, if any, from the subscriber (less ten percent of the purchase price), and cancel the subscription. If it cancels the subscription, the shares become authorized but unissued shares. The corporation is permitted to retain ten percent for two reasons: first the loss of part of the purchase price as a penalty for non-payment will deter investors from reckless entrance into or disregard of subscription agreements; and second the retention of this amount by the corporation will partially compensate the corporation for the opportunity costs of and additional expenses incurred in finding a new owner for those shares.

Section 57

SOURCE: MBCA, Section 18, Paragraphs 1 and 2; Section 19, Paragraph 3; Section 25, Paragraphs 2, 3 and 4; Minnesota Statutes, Section 301.16, Subdivision 2; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.15 and 301.16

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.15 required certain types of consideration for shares. Under this section, almost any type of consideration is valid, although consideration transferred in the future must be tendered to the corporation in an enforceable written agreement. No consideration at all is required for the issuance of shares in exchange for or in conversion of other shares of the corporation. Valuations of non-monetary consideration will be presumed to comply with the standard of conduct provided in section 44 if made in accordance with accounting principles, or methods of valuation, reasonable in the circumstances. The corporation may issue shares and share certificates only upon receipt of the consideration or an enforceable written agreement to transfer the consideration at some future date to the corporation. Liability for wrongful valuation is set forth in detail in this section and has been expanded slightly. The statute of limitations has been reduced to one year.

GENERAL COMMENT:

This section governs the type and quantity of consideration that may be accepted by the corporation in exchange for its shares.

Subdivision 1 retains and expands the already flexible definition contained in existing Minnesota law (Section 301.15, subdivision 1) of valid consideration. Almost any consideration is acceptable as long as it is approved by the board or the shareholders, and as long as all consideration other than money is given a dollar value. Services to be rendered have been retained as valid type of consideration, in order to protect the investment of those persons who have nothing but their labor to contribute to the capital of the corporation. Elimination of this group is an unacceptable barrier to small business capital formation and would not add materially to the stability of the capital structure of a corporation. In fact, any consideration of value, actual or promised, may be accepted, if the resolution authorizes its acceptance either specifically or generally.

The directors or shareholders need not list the price of every share issued. Instead, they may establish a minimum price or a general formula from which the price of the shares may be computed without any further need for board or shareholder action. If the resolution establishes such a minimum price, the board may authorize the sale of those shares at any higher price. If the resolution establishes a formula, the board may authorize the sale of shares at a price computed by that formula.

No consideration is required for shares issued in the course of exchanges, conversions, share splits, reverse share splits, or share dividends, if the issuance is authorized by a resolution of the board or the shareholders. However, only shares of the class or series to be exchanged or converted, or in respect of which the split or dividend has been declared, may be issued unless the articles permit the issuance of a different class or series in the course of that transaction, or unless an absolute majority of the holders of the class or series to be issued in the transaction approve the issuance. This class approval is required because the issuance is as much a modification of the investment contract as the types of amendment which require class voting under section 15.

Subdivision 2 establishes the presumption that the valuation of consideration, or the approval of the terms of payment of the consideration is in compliance with the standard of conduct provided in section 44 if made on the basis of

accounting or valuation methods reasonable in the circumstances. This standard of reasonableness recurs throughout the statute and is discussed in detail in the General Comment to section 85. Once the presumption is established, the directors or shareholders are protected from liability by section 44 unless it is proven that they willfully or negligently voted for, or were present and failed to vote against, the issuance of shares for unfair or overvalued consideration. In that case the directors or shareholders (whichever is appropriate) are jointly and severally liable to the corporation for the amount of the damages suffered by shareholders who are not so liable. See Section 301.16, subdivision 2. Each director or shareholder found liable, except those found liable of knowing, deliberate fraud, may sue any or all other persons found liable under this section for contribution.

Under subdivision 3, a corporation may issue share certificates, or in the case of uncertificated shares may register the shares to a new owner, only when those shares are nonassessable, that is, when the consideration due has been received by the corporation, or when all of the shareholders consent to the issue. In order for the consideration to have been "received by the corporation" in the case of future consideration, it is required only that the corporation have received an enforceable written agreement to transfer property or render services in the future. The requirement that no shares issue until the full consideration was paid or rendered to the corporation (Section 301.18, subdivisions 1, 2 and 3) has been eliminated, because the action on the written agremenet provies ample protection to the corporation, while permitting the shareholder to vote the shares, receive distributions in respect of the shares, transfer or pledge the shares, and otherwise act as a shareholder.

Directors should be aware that the standard of conduct provided in section 44 applies to acts of the board under this and all other sections. In certain circumstances the issuance of shares for certain types of consideration, especially for future consideration, may be a violation of that standard of conduct for which directors will be personally liable.

Failure to comply with this section would result in liability for the difference between the amount agreed upon and the amount received. Those liable are the persons who approved the issuance of shares, if they knew of the violation at the time the issuance was approved, the persons who originally received the shares and any transferees of or successors to the interest of that person if they acquired the shares knowing of the violation. The liability of the original shareholder is absolute because subscribers and shareholders have a duty to pay the full price of their shares, see section 63. However, those directors or shareholders who approved the issuance of shares without full knowledge of the actual value of the consideration, should not be liable for the difference between the full price and the actual value if they have not violated the provisions of subdivision 2, or section 44. Those who acquire shares from an original shareholder without knowledge of such a deficiency should not be required to pay to the corporation what they may have already paid to the original shareholder.

This section limits the liability of pledgees and other similar persons to the assets held in their roles as such. If the delinquent shares are surrendered to the corporation, the pledgees will not be liable for the deficiency, even if they took the shares with knowledge of the unpaid amount. Pledgees or legal representatives are not guarantors of payment; once the underpaid shares have been returned to the corporation, there is no reason for the corporation to require further payment.

All persons liable under this section may seek contribution from all others liable as a result of the same transaction.

Section 58

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.14, Subdivisions 6, 7 and 8

CHANGE FROM FORMER LAW: This section governs "rights to purchase," a term which includes the right to purchase, exchange, or convert securities into shares. This section differs only in form from section 301.14, subdivision 6, which contains the general grant of authority to issue such rights. Subdivision 3 of the new provision is taken directly from subdivision 6. Subdivision 4 requires that a number of authorized, unissued shares sufficient to satisfy all outstanding rights to purchase must be reserved at all times; this is not a change in the law. However, under this section, the board has the inherent power to issue and fix all the terms of these rights, even in the absence of specific authorization to do so in the articles or in a resolution of the shareholders. This authorization was required under section 301.14, subdivision 7. An actual certificate for these rights remains optional, but in the absence of such a certificate, a statement of the terms of the right to purchase is still required.

GENERAL COMMENT:

Section 55, subdivision 1, and subdivision 2 of this section give the corporation the power to issue rights to purchase. The phrase "right to purchase" has been defined to include all warrants, options, convertible debentures, and similar rights. This definition is to be construed as broadly as possible. What these securities have in common is the right they bestow on their holders, namely, the right to acquire shares of the corporation either directly or indirectly by conversion or exchange. Because the rules governing these rights should be uniform and because of the ease of reference the phrase "right to purchase" produces, all of these rights are referred to as one category.

These rights may take any form the board desires to give them. Any combination of rights or terms is permitted. In order to provide the board with the greatest possible discretion, subdivisions 3 and 4 grant the board the power to fix virtually all of the terms of the rights to purchase, with little or no need to conform to any document except the articles. The articles may restrict the right to issue these rights to purchase, or may limit or restrict the power of the board to fix the terms of the rights to purchase. If the articles do not contain explicit provisions dealing with this matter, the board has a free hand.

In the event that rights to purchase are issued, those persons who purchase or otherwise receive those rights are also entitled to receive a statement, or a document incorporating by reference and indicating how the person may obtain a statement, of all of the terms, provisions, and conditions of the rights to purchase. If the rights to purchase are evidenced by a special document or certificate, this list or reference to a list must appear on the document. If the right is not evidenced by a certificate, a transaction statement (see Minnesota Statutes, Section 336.8-408) must be delivered to those persons and must contain a list or reference to a list of the terms, provisions and conditions of those rights. The definition of "right to purchase" includes a contractual agreement, and any such agreement may comply with subdivision 5 by listing the terms, provisions, and conditions of the right to purchae in the contract.

Section 59

SOURCE: N.J. Stat. Ann. Section 14A:5-29(3); New

FORMER MINNESOTA PROVISION: Section 301.04(9)

CHANGE FROM FORMER LAW: Prior Minnesota law on this subject was largely decisional. Cases such as Jones v. Morrison, 31 Minn. 140, 16 N.W. 854 (1883) (power to increase capital shares of a corporation; additional shares to be held in trust for existing shareholders according to their proportional ownership), Van Slyke v. Norris, 159 Minn. 63, 198 N.W. 409 (1924) (shareholder having preference right to shares may not recover damages based on that right after failing to exercise the right) and Falk v. Dirigold, 174 Minn. 219, 219 N.W. 82 (1928) (plaintiff entitled to same proportion of present shares that he held of the original shares, and may enforce that right) upheld preemptive rights and the right to enforce those rights. However, Minnesota Statutes, Section 301.04(9) barely hints at the existence of those rights by providing only that the articles may limit or deny preemptive rights. This section defines preemptive rights, states when those rights accrue to the shareholder, defines the exceptions to those rights, defines what those rights entitle the shareholder to purchase and how the shareholder is to be notified of that purchase, and defines the result of failure to exercise of those rights.

GENERAL COMMENT:

This section provides a definition of preemptive rights and a detailed procedure for their exercise. However, the definition and procedure are only statutory presumptions which may be denied or limited in the articles or, in regard to a specific class or series, in a resolution of the board fixing the rights and preferences of that class or series, if the board is authorized to do so by the articles. (See section 52.)

The detailed procedure is based primarily on the New Jersey provision, N.J. Stat. Ann. Section 14A:5-2(3), which itself is based upon New York Business Corporation Law, Section 622.

Subdivision 2 defines preemptive rights. It does not define when those rights may be exercised (see subdivision 3) or what the "certain fraction" that the shareholder may acquire is (see subdivision 5), but it does state the basic rule that the shareholder has a right to contribute more capital to the corporation, and to receive more shares, securities, or rights to purchase shares or securities for that contribution, before the corporation may issue shares, securities, or rights to purchase shares or securities to others. This gives the original investors the opportunity to preserve the original degree of control they had over the corporation.

However, not every shareholder has a preemptive right in all instances where shares, securities, or rights to purchase shares or securities are issued. The shareholder has a right to maintain proportional ownership of only the particular class or series of shares he or she owns. Therefore, when a corporation proposes to issue shares of that class or series, or securities convertible into or exchangeable for shares of that class or series, or rights to purchase shares of that class or series, see section 58, the shareholder has a preemptive right to purchase some of those shares, securities, or rights to purchase shares. A shareholder does not have a preemptive right to purchase shares of or convertible only into another class or series, rights to purchase shares of or shares convertible only into another class or series, securities that are not convertible into the class or series of shares owned by the shareholder, or rights to purchase securities that are not convertible into the class or series of shares owned by a

shareholder.

The preemptive right is further limited by subdivision 4, which exempts shares, securities or rights to purchase shares or securities issued in connection with certain transactions from the exercise of preemptive rights, including:

a) Shares issued for nonmonetary consideration. The consideration may well be unique; it may be the services of a particular person, land, plant, or an entire business. In this situation, the original shareholders have nothing comparable to offer, unlike the usual case where the corporation seeks only cash. It may also be impossible to act quickly under the articles to issue a new class or series of shares to be exchanged for that consideration to take advantage of opportunities.

b) Shares issued pursuant to a plan of merger or exchange. Shareholders must approve these major corporate transactions, and therefore consent to the issuance of shares under the plan, except in those cases where no material dilution would result from a merger, see section 91, subdivision 3. Moreover, the holders of a class or series involved in an exchange vote on the exchange as a class or series, section 91, subdivision 2. In a merger, the class or series votes if the merger would modify a right of that class listed in section 16, section 91, subdivision 2.

Shareholders who wish to maintain their proportional ownership may signal their disagreement with the purpose of the merger or exchange by voting against approval or by dissenting under sections 80 and 81. Mergers and exchange are usually entered into for reasons antithetic to the concept of preemptive rights.

c) Shares issued pursuant to employee or incentive benefit plans. These plans set aside a certain number of shares for purchase by corporate executives and employees. If preemptive rights were to be allowed with respect to these shares, the number of shares available for this purpose would always be uncertain and, if preemptive rights were fully exercised, no shares would be available. Moreover, many of these plans must be approved by the shareholders, in order to comply with other laws, for example Internal Revenue Code Sections 422(b) and 423(b)(1).

d) Shares issued as a result of the prior sale of rights to purchase shares or securities. These rights to purchase have already been subject to preemptive rights once and need not be subject to those rights a second time.

e) Shares issued in a public offering. Shareholders can maintain their proportionate ownership by purchasing shares on the open market after the issuance of the shares.

f) Shares issued under a court-ordered reorganization. The power of the court will protect the rights, if any, of the existing shareholders.

Subdivision 5 expresses in verbal form the mathematical formula for computing the number of shares a shareholder is entitled to purchase in the exercise of a preemptive right. That formula is:

$$X = Y \frac{A}{B}$$

Where X = The number of shares of the class or series proposed to be issued, or rights to purchase, that the individual shareholder in question is entitled to purchase.

Y = the sum of the number of shares of that class or series proposed to be issued, the number of shares of that class or series into which the securities proposed to be issued are convertible, the number of shares that may be purchased with the rights to purchase shares proposed to be issued and the number of shares into which the securities that may be purchased with the rights to purchase securitiies proposed to be issued may be converted.

A = The sum of the number of shares of that class or series owned by the shareholder in question prior to the proposed issuance, the number of shares of that class or series into which securities owned by that shareholder prior to the proposed issuance could be converted, and the number of shares of that class or series into which securities which could be purchased under rights to purchase owned by that shareholder prior to the proposed issuance could be converted.

B = The sum of the number of shares of that class or series outstanding before the issuance, the number of shares of that class or series into which all securities outstanding before the issuance could be converted, and the number of shares of that class or series into which securities which could be purchased under all outstanding rights to purchase could be converted.

Shareholders may waive their preemptive rights to a proposed issuance in writing. Oral waivers are not binding. A written waiver requires no consideration to be effective. In any case, a waiver of preemptive rights is effective only for one proposed issuance which must be described specifically in the waiver, unless the waiver clearly states that it is for more than one proposed issuance and states what issuance it does include. A waiver may include all future issuances if it explicitly states such a blanket waiver in its text.

Each corporation that proposes to issue shares, securities or rights to purchase shares or securities must give all shareholders who have preemptive rights under subdivision 3 written notice stating the number of newly issued shares, securities, or rights to purchase to which each shareholder is entitled, the price, terms, and conditions on which the preemptive right may be exercised, and the manner in which the shareholders must exercise the right. This notice must be given at least ten days prior to the expiration of that right and must conform to section 1, subdivision 18.

Any shares, securities, or rights to purchase shares or securities which shareholders do not purchase in the exercise of their preemptive rights may be sold to any person, shareholder or otherwise, for one year following the date listed pursuant to subdivision 7 (c). Those shares may be issued at any price equal to or larger than, and/or on any condition equally or less favorable than, that offered to the shareholders. The price must be no less than the price to the shareholders under preemptive rights. This will avoid possible abuse of the preemptive right mechanism by preventing a corporation from offering the shares to the shareholders at a prohibitively high price followed by an offer to outside investors at a more attractive price, with the intended (and ultimate) result of sidestepping preemptive rights altogether while complying with the letter of the law.

absent a provision in the articles requiring the signatures of different officers both the secretary and the president of the corporation to sign each certificate. However, corporations are no longer required to have a secretary, and any one person may hold all the corporate offices. A multiple signature requirement would be burdensome and would not necessarily provide any more protection against fraudulently-signed certificates than this subdivision provides. The officer who is to sign the certificates, or whose facsimile signature is to be placed upon the certificates, may be listed in the articles or bylaws; that is, the articles or bylaws may authorize the holder of a particular office or agency to sign certificates.

In the absence of a specific authorization in the articles or bylaws, any officer appointed or elected by the board under sections 47 or 48 or qualified under section 50 may sign share certificates. This section broadens the inherent authority of officers to permit any officer to sign share certificate in the absence of a provision in the articles or bylaws because officers have a standard of conduct to which they must adhere. Breaches of that standard may result in officer liability. The standard and the threat of liability is sufficient to protect the corporation from the fraudulent or false signing of share certificates.

The signatures on any share certificate may be facsimiles placed on the share certificate in any manner. There is no statutorily required manner of signature; there is no requirement that each certificate bear the actual signature of an authorized person. Indeed, this could become physically impossible if the corporation has many shares outstanding. The replacement of the actual signature with a facsimile does not in itself expose the corporation to a greater risk of the illegal issue or signature of share certificates.

If the signatures on share certificates are valid at the time the signature is placed on the certificate, then the fact that the signer is no longer authorized under subdivision 2 to sign certificates at the time of issue does not render those certificates invalid. It is impractical to expect that each new authorized officer or agent must sign, or that with the advent of each new authorized officer the corporation must order, new share certificates.

Each share certificate must have certain information or references to that information printed on its surface. Four items of information must appear on the face or front of the certificate: the name of the corporation, so that the shares may be easily identified as shares issued by that corporation; the state of incorporation (Minnesota), so that the holder will know the law by which rights associated with the shares are to be governed; the name of the person to whom the shares have been issued (or to whom the shares are registered) in the records of the corporation, so that ownership may be easily established and so that only the record owner may transfer the share; and the number of shares and the class or series of the shares, represented by the certificate. These four items must appear on the face because of their basic importance. Other items that must be stated or referred to on the certificate, but which may be located on either side of the certificate, include other details of the investment contract such as the rights, preferences, limitations, and designations of all previously authorized classes and series (so that the holder can determine his position relative to the other outstanding shares), and the right of the board under section 52, subdivision 2(b) to authorize, issue and fix the preferences of shares to be issued after the issuance of the shares in question, so that the holder may determine those areas in which the rights granted him under the investment contract may be changed. Other restrictions that must appear or be referred to on the certificate (or the transaction statement) include any transfer restrictions under section 64 and shareholder control agreements under section 76. Any or all of this information may be made available in a

separate document if the certificate bears a legend briefly describing the information and where it is available.

Possession of the certificate is not the only way in which ownership of the underlying shares may be established, see Minnesota Statutes, Section 336.8-313, but it does create a presumption that such ownership exists, even though a transfer of ownership may not yet have been entered into the share register of the corporation, see In re Bush's Trust, 249 Minn. 36, 81 N.W. 2d 615 (1957) (title normally follows certificate, despite failure to record transfer) and cases cited. Of course, this presumption may be overcome in several ways, including a showing that there was no intent to transfer ownership at the time of the transfer of possession.

Subdivision 7 reiterates the point made in subdivision 1 that any portion or all of the shares of one or more classes or series may be uncertificated if the board approves a resolution to that effect, unless the articles or bylaws state a different or more restrictive rule. Certificated shares may be converted into uncertificated shares after passage of a resolution explicitly declaring those shares eligible for conversion, but the actual conversion is effectively at the option of the shareholder through the shareholder's decision whether or not to surrender the share certificates, because this conversion is an impairment of the original investment contract.

The corporation must send a statement bearing the information required by subdivisions 4 and 5 to appear upon certificates to each new holder of uncertificated shares. Compliance with Article 8 of the U.C.C., Minnesota Statutes, Section 336.8-408, will satisfy this requirement, and that compliance is a "safe harbor" under this statute.

The last sentence refers to the different rights granted under Article 8, of the U.C.C., Minnesota Statutes, Section 336.8-101 to 8-408 to certificated and uncertificated shares. Except for the differences set forth in those sections, the rights of these two types of shares are identical.

Section 61

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 300.56 (repealed in 1965)

CHANGE FROM FORMER LAW: Minnesota corporate law has not had a provision dealing with lost share certificates since 1965, when Minnesota Statutes, Section 300.56 was repealed, presumably because of the inconsistency between it and Minnesota Statutes, Section 336.8-405. The new provision makes it clear that a corporation has the power to issue replacement certificates consistent with 336.8-405.

GENERAL COMMENT:

Corporations are creatures of limited powers. Despite the fact that the U.C.C. permits the replacement of lost share certificates under certain circumstances, no section in the statutes governing corporations explicitly empowers corporations to issue replacement certificates or even refers to the relevant U.C.C. provision. This section grants the corporation the power to issue replacements, refers the reader to 336.8-405 for all details regarding the issuance of those replacements, and provides that replacement certificates will not be considered an overissue in excess of the number of shares authorized in the articles.

Section 62

SOURCE: Cal. Corp. Code Section 407 (West)

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota law did not previously address this issue. This section explicitly permits corporations to issue fractional shares or scrip or warrants representing a right to purchase fractional shares. It also limits that issuance in certain ways.

GENERAL COMMENT:

This section permits, but does not require, a corporation to issue fractional shares to a shareholder, either at the time of issue or at the time of a subsequent transfer or exchange. Fractional shares may be useful in situations where a shareholder's contribution to capital does not entitle him or her to a round number of shares, or where the shares have an extremely high price, or where shares have been issued in a merger or exchange in a ratio that does not readily convert the shares of the other constituent corporations into whole numbers of shares of the surviving or acquiring corporation.

If a corporation chooses not to issue fractional shares, it is required to take one of the following three actions:

a) Devise a plan, agreed to by the holders of the fractional interests, that gives those holders consideration in addition to, in combination with, or other than, money for their fractional interest, e.g., offering the holders of fractional interests shares of a different class or series with a different value that convert more readily into whole shares, or arranging a sale of the fractional interests to a third party, or exchanging the fractional interests for other securities (bonds, debentures) equivalent to the worth of the fractional share; or

b) Pay the fair value of the fractional interest, measured at the effective time of the transaction which entitled the holder to the fractional interest (the effective date of the merger or exchange), or, in those cases where a shareholder purchases a fractional interest which cannot be reduced to whole shares, at the time the shares purchased were rendered nonassessable, transfer the full consideration, or, if the full consideration has not been transferred, at the time the other shareholders consented under section 54, subdivision 3(a) to the issue of shares; or

c) Give the holders of the fractional interests scrip or warrants which may be exchanged for whole shares upon the surrender of a fixed number or amount of these scrip or warrant documents. These scrip or warrant documents may be transferable, and may be in either registered or bearer form.

A provision in the California law, Cal. Corp. Code Section 407 (West), permits a corporation to disregard fractional interests or to round off those interests to the nearest share in connection with shares issued in mergers or exchanges where the fractional interest is less than one-half of one percent of the interest of that holder. Although inclusion of this provision would simplify matters for a corporation and would not create any risk of substantial dilution of the shareholder's interest, it is just as simple to pay that holder the value of his or her fractional interest under subdivision 1(b) and may be more equitable in certan cases. The California provision has not been included.

However, this section permits the cash-out of fractional shares in those cases where that cash out would cancel shares equal to or less than one-fifth of the shares of a particular class. This prohibition protects shareholders against excessive

abuse of the power granted by subdivision 1(b) in cases where many or most of the shares are fractional interests due to an unusual ratio of exchange, or where the price of one share is unusually high or where controlling interests have issued only fractional shares.

This section also discusses in detail the rights of fractional shares, scrip and warrants. A certificate for a fractional share entitles the holder to exercise voting rights, to receive dividends and to participate in any distribution of the assets of the corporation in the event of liquidation, in short, to exercise all the rights of a full share of that class on a proportional scale. However, scrip or warrants do not have these rights unless the terms of the scrip or warrants provide otherwise. Moreover, scrip or warrants may be issued by the board subject to any conditions which the board may impose. For example, there may be a condition that scrip or warrants become void if not exchanged for certificates representing full shares before a specified date, or a condition that shares for which scrip or warrants are exchangeable may be sold by the corporation and the proceeds distributed to the holders of the scrip or warrants.

Section 63

SOURCE: New; derived from MBCA Section 25, Paragraph 1

FORMER MINNESOTA PROVISION: Section 301.19

CHANGE FROM FORMER LAW: The effect of this section is to ensure that the only liability a shareholder has with respect to his shares is the liability to pay the full, agreed upon consideration to the corporation. This wording removes the ambiguity in former law caused by the reference in Section 301.19 to Section 301.15. We have omitted the second paragraph of Section 301.19 because it introduces an exemption from liability caused by a failure to act which is not attributable solely to shareholder status. The liability discussed in that paragraph is governed by and discussed in section 54, subdivision 3, the effect of which is the same as the Section 301.19 provision omitted here.

GENERAL COMMENT:

The notion that, absent special facts, the liability of a shareholder is limited to the contribution to capital in the event that the shares are fully paid, "developed as a sort of afterthought," H. Henn, Handbook of the Law of Corporations, 14 (2d. Ed., 1970). In Minnesota it was more than an afterthought; it was positively tardy. Prior to 1930, Article X, Section 3 of the Constitution of 1857 provided for personal liability of such shareholders for the upaid debts of the corporation proportional to the shareholder's interest. (We were not alone. A similar provision persisted in California until the same year.) However, in 1930 the electorate approved a constitutional amendment permitting the legislature to limit by statute the liability of shareholders, which it did the following year (Laws 1931, Ch. 210). That concept was carried over as Section 301.19.

This provision continues and reasserts with even stronger force the proposition that a shareholder is not personally liable to or on behalf of the corporation for the mere ownership of shares in that corporation, Ahlm v. Rooney, 274 Minn. 259, 263, 264, 143 N.W. 2d 65, 68 (1966) (sole shareholders in two-man corporation not personally liable absent reason to disregard corporate entity). The shareholder may be either a natural or artificial person, and still possess the right of limited liability, Lober v. Canadian Pacific Ry. Co., 151 F. 2d 758, at 762 (8th Cir. 1945) cert. den., 66 S. Ct. 490 (1946). The fact that there are few shareholders, or only one, is

irrelevant, Ahlm v. Rooney, supra at 264, 143 N.W. 2d at 69. Under this section a shareholder is simply not liable beyond his investment, without more.

What constitutes "more"? Liability for acts committed in a role other than shareholder (i.e., officer, director, agent, or some other role) is not governed or limited by this section. Certain acts or failures to act, even if no other role is assumed, will also lead to personal liability in varying degrees, for various claims, for various acts. For example, if the corporate entity is defective, or if that entity is disregarded, personal liability may result (for a further discussion of that subject, see the Comment to section 20.); if the shareholder has failed to comply fully with his or her subscription agreement, or with section 57, subdivision 3, he or she is liable for the difference between the agreed consideration and the paid-in consideration (see sections 56 and 57); if the shareholder has received a distribution which violates section 85 by rendering the corporation unable to pay its debts in the ordinary course of business, he or she is liable under section 87, but only for the amount actually received that exceeds the amount that could have been received legally; if the shareholder receives a distribution in dissolution, he or she is liable under section 117, for any claims arising after the corporation is dissolved. Further discussion of all of these circumstances can be found in the Comments to the sections mentioned above.

Section 64

SOURCE: Del. Code, Title 8, Section 202; New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: This section explicitly permits several kinds of transfer and registration restrictions in a way which had only been hinted at in the prior law. See Minnesota Statutes 301.04(5), 301.14, Subd. 1; cf. Hart v. Bell, 222 Minn. 69, 23 N.W. 2d 375 (1946) (voting agreements lawful absent an intent to defraud or profit at the expense of other shareholders); Minn. Stat. 336.8-204, cf. Warren Swazy Co. v. Ristenholz, 41 F. Supp. 498, 504 (D. Minn. 1941). This section replaces vague and uncertain language with a clear rule.

GENERAL COMMENT:

UCC 8-204 (Minnesota Statutes, Section 336.8-204) requires transfer and registration restrictions to appear on the certificate or transaction statement. Unfortunately, 8-204 only mentions "restrictions . . . otherwise lawful . . . ."; one must look elsewhere for authority to impose such restrictions. Minnesota Statutes, Section 301.04(5) speaks of the "restrictions" applicable to a class or series that may be imposed by the articles, but this part of Chapter 301 has never been interpreted but see Blien v. Rand, 77 Minn. 110, 79 N.W. 606 (1899) (limitation of shareownership to Norwegians upheld) allowing transfer restrictions) and Model Clothing House v. Dickinson, 146 Minn. 367, 371-72, 178 N.W. 957, 959 (1926). "A corporation, as a matter of business prudence, may legitimately desire to keep its stock in the hands of those who are congenial and will work together for the success of the enterprise, and to that end may protect itself, in proper ways, against the acquisition of its stock by disturbers, rivals in business, or other outsiders who might not be congenial and might purchase the stock to acquire information which might be used to the disadvantage of the company." The common law has been the principal source of authority for transfer restrictions in other jurisdictions, but few Minnesota cases have considered the issue. Those that have considered the issue seem to have validated such restrictions in a way which is relatively

restrictive when compared with the liberal attitude of some other jurisdictions.

This section provides a comprehensive rule covering the entire field of transfer and registration restrictions. This section is in derogation of the common law policy against enforcing restraints on alienation if the restraint in question is in compliance with this section. Subdivision 1 describes the manner in which a restriction may be imposed, while subdivision 2 defines enforceable restrictions.

The language of this provision has been borrowed, almost word for word, from the text of Delaware Corporation Law, Section 202, paragraphs (a) and (b). The text of paragraphs (c), (d), and (e) of section 202 has been omitted, because the use of a list of restrictions might be construed to limit the sort of restriction considered reasonable in the circumstances under subdivision 2. However, the restrictions contained in the omitted text are deemed to be in full compliance with this section, and any transfer restriction which complies with the text of paragraphs (c), (d), or (e), is valid and enforceable. The list is absent only to ensure that subdivision 2 is construed liberally.

Subdivision 1 provides that restrictions may be imposed in three documents: the articles, the bylaws, and agreements to which the individual shareholder in question is a party. An agreement need not comply with the requirements of section 76 in order to contain a valid transfer restriction for purposes of this section. That agreement is binding only on those holders of shares or securities who sign it, even if less than all of the holders of shares or securities are parties. The agreement may be structured as an agreement among holders of shares or securities or an agreement among holders of shares or securities and the corporation thus binding the corporation not to record any transfers in violation of the agreement. In any case, no agreement may be applied retroactively to shares issued prior to the adoption of the restriction unless the owners of those shares consent to the restriction by voting for the article or bylaw provision or signing the agreement imposing the restriction.

Subdivision 2 validates and permits the enforcement of any restriction on transfer or registration of shares or securities as long as that restriction is not manifestly unreasonable in the circumstances and is noted conspicuously on a certificate or transaction statement.

"Not manifestly unreasonable", includes restriction which operates with equal force upon all holders of shares or securities who have agreed to or who are subject to a restriction on a particular class of shares or securities, and that does not operate as both an absolute and a permanent bar to voluntary transfer under all circumstances.

Transfer restrictions which are either absolute without being permanent (e.g., "No shares or securities may be transferred for 15 years after their issue), or permanent without being absolute (e.g., "No shares may be sold to residents of states other than Minnesota.") are permitted under this section, but a transfer restriction may not be both absolute and permanent (e.g., "No shares of this corporation may ever be transferred to any person or to the corporation.") and remain valid under this section.

The following restrictions are always deemed "not manifestly unreasonable": first, any restriction which requires the holder to give the corporation, the other shareholders, or any combination of either or both, a right of first refusal or an option, to purchase the shares; second, any restriction which obligates any person (including non-natural persons) to purchase the shares or securities that are so restricted, (i.e., buy-sell agreements); third, any restriction which requires the consent

of the corporation or of any or all of the holders of any or all classes of shares or securities; and fourth, any restriction which is imposed for the purpose of, and which is actually effective in, for example, maintaining the status of the corporation as a Subchapter S corporation. Other restrictions contemplated by other laws (Internal Revenue Code) are also "not manifestly unreasonable."

Each transfer restriction must be noted conspicuously on the certificate or transaction statement. This language also appears in U.C.C. 8-204, and any restriction noted in a way which satisfies the requirements of U.C.C. 8-204 complies with this section in that respect. However, while the application of U.C.C. 8-204 is limited to restrictions imposed by the issuer, presumably through the articles or bylaws, this section also refers to restrictions imposed pursuant to shareholder agreements. These restrictions must also be noted in the manner required by U.C.C. 8-204. Restrictions not noted conspicuously will not be effective against persons without knowledge of the restriction but persons who are aware of the restrictions are subject to those restrictions whether the shares or securities they hold are properly legended or not.

Section 65

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.25

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.25 required a shareholder meeting at least once a year and required the election of directors to be considered at each such meeting. This section permits shareholder meetings to be held at any desirable interval not more frequently than once every year. Moreover, it even makes that meeting optional unless the articles or bylaws require the meeting, or unless holders of one percent of all of the voting shares desire a meeting. When a meeting is held, an election of directors may not be required if the structure of the board is such that no director's term will expire before or within six months after that.

GENERAL COMMENT:

The regular meeting set forth in this section replaces the annual meeting. There is no reason for the shareholders of the corporation to be required by state law to meet once each year, especially because this statute now provides that the presumptive term of directors is indefinite and is no longer one year, and because of the general policy of this statute streamlining the corporate entity and reducing unnecessary formalities. The logical result of these policites is to provide that shareholder meetings may be held at any regular interval set by the board or by the articles or bylaws or at the call of the shareholders.

In order to ensure shareholder control, this section permits a small group of shareholders to demand a regular meeting under certain circumstances. There is, however, no penalty for failing to hold a regular meeting if a regular meeting is not specifically demanded by a shareholder on the basis of provisions in the articles or bylaws requiring such meetings or on the basis of a valid demand by the holders of one percent of the shares under subdivision 2 of this section. Under this section, a corporation could conceivably exist for years without calling an official shareholders meeting. This is closer to actual practice in many of the small corporations that comprise substantially all Minnesota corporations.

Any group of shareholders of voting shares may by demand call a regular meeting if:

a) A regular meeting has not been held in the 15 months prior to the filing of the demand;

b) The holders of one percent or more of the voting shares sign the demand; and

c) The demand is given to the chief executive officer (CEO) or the chief financial officer (CFO) of the corporation.

The demand need not state the date, time or place of the proposed meeting; it need only state that the undersigned demand a regular meeting under this section. The fact that a special meeting may have been held at some time during that 15 months period does not prevent the shareholders from demanding a regular meeting. The signatures of the shareholders making the demand need not appear on the same page, and signatures appearing on different demands shall be considered as part of the demand (cf. section 1, subdivision 38) if the demands are timely given to the corporation officer. A system under which shareholders could make the demand over an extended period was rejected as excessively cumbersome.

Upon delivery of a valid demand to either the CEO or CFO, the shareholders have a right to meet within 90 days after that delivery. The board may cause the specific day or date and time of the meeting to be set only if they cause the meeting to be called and notice sent (see section 67) to the shareholders within 30 days after delivery of the demand. There is no penalty for failing to call the meeting within that time (although the shareholders may bring an action under section 79 for an order requiring the board to call the meeting), but any shareholder who signed the demand may call the meeting and set the day, date, and time of the meeting if the board does not cause the meeting to be called within that 30 days. In either case, the shareholder meeting will be held in the county where the principal executive office of the corporation is located because that is likely to be the most convenient meeting location in terms of access to corporate records, and because that location is unlikely to change frequently, thus providing certainty as to where the meeting will be held (but see section 1, subdivision 25).

If the regular meeting is being held without demand, the day, date, time and place of the meeting may be fixed by the articles or bylaws, or the articles or bylaws may give the board the power to fix these details.

Subdivision 4 requires that successors to the following directors must be elected at a regular meeting:

1) All directors elected to an indefinite term;

2) All directors elected to fixed terms whose terms have expired since the last regular meeting; and

3) All directors elected to fixed terms, whose terms will expire within six months after the date of this regular meeting.

These elections must take place at the regular meeting before if may legally adjourn. By requiring the election, shareholder control of the corporation is reinforced at the option of the holders of one percent of the shares, and abdication of this control can be easily countered by that very small minority.

Any matter in which the shareholders have a legitimate interest may be discussed and acted upon at a regular meeting.

Unlike the special meeting, the agenda is not limited to items set forth in the notice (see section 67, subdivision 4). Indeed, no item is required to be set forth in the notice under this section. However, notice of a particular action may be required by other sections, for example, section 91, subdivision 1, which requires 14 days notice of consideration of a plan of

merger or exchange. Any subject is a proper item of new or old business at a regular meeting.

Section 66

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.25, Subdivisions 3 and 5

CHANGE FROM FORMER LAW: Under this section, the chief executive officer and the chief financial officer, not the president, are authorized to call special meetings. The officers have 30 days, not seven, to fix the date and time of the meeting, and, the meeting may be held 90 days not 60 days, after the receipt of the demand. The new provision also explains in more detail which matters may be transacted at a special meeting.

GENERAL COMMENT:

Special meetings may be called at any time, for any purpose. There is no limit on the number of special meetings that may be called or held within any particular time period. Special meetings are not required at any time unless one of the five persons or groups of persons calls a special meeting. These persons or groups are listed in subdivision 1; the "identity" of these persons or groups are unchanged from current law, except that consistent with the general replacement of the term "president" in this statute, the term "chief executive officer" (CEO), is used, and the "chief financial officer" (CFO) (see section 47) has been added to the list of persons who may call meetings. The first four persons or groups listed may call meetings by right; in the case of the CEO, the CFO, or an authorized person (subdivisions 1(a), (b), and (d)), the CEO, the CFO, or the person may fix the date, time, and place of the meeting. In the case of groups of directors, they shall inform the CEO that they are causing the calling of a meeting, and the CEO shall schedule and call the meeting.

Shareholders must go through a slightly different procedure under subdivision 2. That procedure is very similar to the procedure for calling regular meetings set forth in section 65, subdivision 2, except that the shareholders demanding the meeting must hold ten percent, not merely one percent, of the voting shares. Otherwise, the procedure is the same, and reference is made to the Comment to section 65. Any meeting called under this procedure is to be held at some place within the county in which the principal executive office is located. Again, see the Comment to section 65.

Special meetings may consider any item of business, including the election of directors. However, notice of the business to be transacted must, under subdivision 4, be part of notice of the the meeting. An item of business not specifically mentioned in that notice cannot be validly transacted at that meeting unless all shareholders waive notice under section 67, subdivision 4, and any action taken without notice or waiver of notice may be voidable in any subsequent suit by the corporation or in any derivative suit on its behalf. The former law made only a rather vague reference to the voidable nature of such action; this section, makes that status clear.

Section 67

SOURCE: MBCA Section 29; Minnesota Statutes, Section 301.25(b); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.25, Subdivisions 4, 5 and 6

CHANGE FROM FORMER LAW: The new section requires that notice be given to the shareholders at least ten days prior to the meeting, unless the articles or bylaws provided a different minimum notice period. It also expands the number of ways in which notice may be waived. In all other respects, however, the section is substantially the same as Minnesota Statutes, Section 301.25, which provided no fixed minimum notice period, which limited waiver to written wavier, and which required notice of the time, place, and purpose for special meetings, the purpose of the meeting.

GENERAL COMMENT:

This section governs the notice to be distributed to shareholders prior to shareholder meetings.

Subdivision 1 requires that notice of all shareholder meetings, both regular and special, be given (see section 1, subdiivision 17) to all of the holders of voting shares.

Those persons who have been certified as beneficial owners to be treated as shareholders under section 71, subdivision 2 are to be given notice directly if they have been certified for the purpose of voting their shares. This direct notice will give them the option of exercising their right, if any, to participate meaningfully in the meeting.

There is one exception to the notice requirement: notice need not be given if the meeting has been adjourned to a particular time and place, if proper notice was given of the meeting which was adjourned, and if the date, time, and place of the reconvened meeting were announced to those present at the time of adjournment. This practice has been retained for the convenience of those shareholders who may wish to adjourn a meeting for less than the ten days required for new notice and for the convenience of the corporation so that the cost of a new notice will be unnecessary. In essence, shareholders who forego the right to attend the initial meeting also waive their right to further notice of adjournments of that meeting. This is perfectly consistent with the provisions of Section 301.25, subdivisions 4 and 7. Read together, those subdivisions permit meetings to be adjourned from time to time in the absence of a quorum, without any new notice of the time or place at which the meeting will continue, other than by an announcement at the meeting.

This provision has been inserted for the convenience of the corporation and the shareholders, in order to permit easy rescheduling of meetings at which quorums cannot be obtained without having to wait for new notice to be sent and for the pre-meeting notice period required by section 67, subdivision 2, to expire. However, under certain circumstances, repeated and unnecessary adjournments which do not have the convenience of the shareholders as the reason for the adjournment may well be, in the context of certain fact situations, an abuse of this mechanism which may be remedied by action for notice under section 79 of this act. A meeting that has been adjourned five or six times would require new notice if the original notice has become stale.

Under subdivision 2, notice must be given, that is, deposited in the mail (see section 1, subdivision 17), ten days or more before the day the meeting is to convene, unless the articles or bylaws provide for a shorter time for notice. This shorter time must be specifically fixed in the articles or bylaws, and authority to fix that time may not be delegated to the board by the articles or bylaws.

The notice may be very short. In the normal course of events, only the date, time, and place of the meeting are

required by subdivision 3 to appear in the notice. Special information is required for certain items (e.g. approval of a plan of merger under section 91), and in the case of a special meeting, the purposes of the meeting must be explicitly set forth in the notice, see section 66, subdivision 4. If the person demanding the special meeting has stated the purpose in the demand, the exact language stating the demand should be used in desdribing the purpose. Finally, other information may be included in the notice, including information required by the articles or bylaws, information inserted by the board, information inserted by the person calling the meeting, or information required by other federal and state laws. Under sections 65, subdivision 2 and section 66, subdivision 2, the board has 30 days to call the meeting, after which the demanding shareholders may call the meeting. If the board calls the meeting, only the board will have the right under this section to insert material in the notice. The shareholders will have no right under this section to insert material until the 30 days allotted to the board have elapsed. This gives the board an incentive to respond swiftly to shareholder demands for meetings, and gives the board the initial option to decide on most of the content of the notice. Of course, applicable federal and state securities laws may require the distribution of certain shareholder material (see Rule 14-a-8; promulgated under the Securities and Exchange Act of 1934) or other additional information (see the Proxy Rules promulgated under the Securities and Exchange Act of 19340, but that subject is beyond the scope of this analysis, and the reader should consult the Securities and Exchange Act of 1934 and Minnesota Statutes, Chapter 80A.

A shareholder may waive notice in several ways under subdivision 4. Written waiver was permitted under the prior law and has been retained. Oral waiver is now a permissable method of waiver, but may be very hard to prove. We have added oral waiver because the form of the waiver is irrelevant to the effect a waiver should have. Waivers may be given at any time, and are effective immediately, if given before the meeting, or are effective retroactive to the time the meeting convened, if given at or after the meeting. The waiver indicates a desire to forego notice; that desire ought to be given effect no matter when it is expressed. A shareholder may also waive notice by attending the meeting either in person or by particular proxy, unless the shareholder attends solely to object to the meeting, or to consideration of an item in certain ways discussed below. The primary function of notice is to inform shareholders of a meeting so that they may attend and participate, whether in person or by proxy. That function is served if the shareholder attends and participates in the meeting; invalidating the action taken at the meeting serves no purpose. However, even if a shareholder is present at a meeting, he or she has a right to object to the meeting or to consideration of an item not mentioned in the notice at a special meeting, because the defective notice has deprived the shareholder of the opportunity to prepare for the meeting, also an important function of notice. Thus, a shareholder may attend a meeting, not waive the right to notice, and retain the right to attack the action in question as invalid if he or she objects to the meeting just after it has been opened, raises a general objection to the manner in which the meeting was called (after which he or she may remain and participate in the meeting), or objects to consideration of a particular item (e.g., an item not mentioned in the notice for a special meeting) question if he or she explicitly objects prior to the consideration of that item and does not participate in the consideration of that item, although the shareholder may remain present to listen to that consideration.

Section 68

SOURCE: New

PRIOR MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota law formerly referred to the proportion required for shareholder action in many places throughout Chapter 301, see Sections 301.36; 301.37, subdivision 3, clauses 2, 3, and 4; 301.39, subdivision 2; and 301.42, subdivision 2, however, there was no single standard for the required proportion. But see Martin v. Chute, 34 Minn. 135, 24 N.W. 353 (1885) (majority of votes cast sufficient to take corporate action if the articles or bylaws are silent on the matter, even if the votes cast are a minority of those present). This section sets forth a clear presumption that the holders of a majority of the shares present can take action, absent special circumstances or requirements in other sections of this statute or in the articles.

GENERAL COMMENT:

This section sets forth in subdivision 1 a presumption that any action approved by the holders of a majority of the voting shares present, in person or by proxy, at a meeting held with proper notice under section 67 and where a quorum is present under section 67, is legal and binding. The majority may be more than a simple majority of those present if either this act or the articles require a greater majority, but if both the act or the articles are silent, the presumptive majority shall apply. A majority of voting shares present and voting is sufficient for most ordinary shareholder actions. This act requires certain extraordinary actions and fundamental changes to be approved by a majority of all voting shares, see, e.g., sections 91 and 97.

It also mandates in subdivision 2 that where class voting is required either by section 15 or other sections, the class must approve the action by the same proportion by which all shares must approve the action. Thus, an exchange proposal would require both a majority of all voting shares and a majority of the shares of the particular class or classes involved in the exchange.

Section 69

SOURCE: MBCA Section 145

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.26, Subdivision 11.

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.26 and this section are substantially similar. Section 301.26 required the signatures of all shareholders entitled to notice while this section requires all shareholders entitled to vote on the action to sign. This section also drops the requirement that in cases where a document approved in this manner must be filed with the secretary of state, the officers signing the filing must indicate that the action was approved without a meeting.

GENERAL COMMENT:

There is no reason that shareholders should be prohibited from taking any action that may take at a shareholder meeting without a meeting if all of the shareholders eligible to vote on the matter at such a meeting agree on the action. Unanimous agreement is necessary in order to assure that the failure to meet does not deprive a shareholder of the chance to persuade his fellow investors; if all of the shareholders agree, no such deprivation occurs. Unanimity is also required under other laws, for example, the Internal Revenue Code (see Rev. Rul. 80-29, 1980-5 I.R.B. at 5, 1980-1 C.B. 93, and the General Comment to section 41 of this act). By requiring unanimity in

this act, this section will prevent shareholders from taking action in a way that violates the requirement of these other laws.

As soon as all of the shareholders have agreed to the action by signing it, the action is effective and binding, and is a legal act of the shareholders under section 65, unless the text of the action itself provides that it is effective at any other time in which case the action will be considered effective at that time when all shareholders have signed the action.

Section 70

SOURCE: MBCA Section 32; Minnesota Statutes, Section 301.25, Subbdivision 7; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.25, Subdivision 7

CHANGE FROM FORMER LAW: This section changes the presumptive quorum from a majority of the shares entitled to vote at the meeting to one-third of those shares. Otherwise, it is substantially the same as Minnesota Statutes, Section 301.25.

GENERAL COMMENT:

Although every corporation is entitled to set its own quorum for shareholders meetings, there is usually a section in the corporate statutes of every jurisdiction setting the quorum in the absence of any different quorum requirement in the articles or, on occasion, the bylaws. These sections generally presume that a majority of the shares entitled to vote is a quorum. Sixteen states permit the corporate documents to set the quorum as low as one-third, Louisiana permits a minimum of one-fourth of the voting shares. There are two states which permit the shareholders present at the meeting to constitute a quorum, no matter how many or how few. This approach was endorsed by the Minnesota courts in Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N.W. 547 (1893) (those shareholders who attend a meeting are a quorum unless the articles or bylaws provide otherwise). This concept is too flexible to assure that abuse by one or two shareholders will not take place. Instead, one-third has been adopted as a reasonable presumptive quorum which shall permit shareholders to carry on business with the most protection and flexibility. All shareholders eligible to be counted towards a quorum must be given relatively ample notice (ten days) under section 67. If the shareholders choose not to attend, the absent shareholders should not be allowed to impose their will on the other shareholders by preventing a quorum from attending, as long as a significant portion of the shareholders participate. One-third is such a significant portion. Moreover, fundamental corporate changes are, in general, required by this statute to be approved by a majority of all voting shares, a proportion which would be a quorum under the statutes of almost every state. Lastly, because the size of the quorum may be varied in the articles or bylaws, the quorum is a matter to be negotiated between the parties involved in forming the corporation and writing the initial articles or to be changed in an amendment of the articles (section 14).

There is no restriction on the maximum possible quorum. If the shareholders wish to set the quorum at "all shareholders" or at the holders of aal voting shares", that is their prerogative. That high a quorum may lead to deadlock, but the power to set the quorum at that level should nonetheless be granted.

This section retains the practice of permitting business to continue at a meeting if a quorum was present at the convening of the meeting, even if a number of shareholders sufficient to

create the absence of a quorum leave the meeting. A shareholder who is able to attend the beginning of a meeting should not be able to prevent the consideration of additional items of business merely by leaving the meeting. The usual expectation of shareholders is that they will be able to conclude their business before adjournment, and that expectation ought to be fulfilled.

The provision in Section 301.25 permitting adjournment from time to time has been omitted, because the shareholders may take that action as part of the business they may transact even in the absence of a quorum.

Section 71

SOURCE: MBCA Sections 2(f), 33; Minnesota Statutes, Section 301.26 (2); (12); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.26, Subdivisions 1, 2, and 12

CHANGE FROM FORMER LAW: This section permits the number of votes per share to be varied in the articles or the bylaws or in the terms of the shares. Minnesota Statutes, Section 301.26 permitted such variance only in the articles. This section also establishes a new procedure for treating beneficial owners as shareholders, states a new rule regarding the voting of jointly-held shares, and establishes a new presumption that when a shareholder votes without signifying how many shares he or she is voting, he is voting all of his or her shares.

GENERAL COMMENT:

Generally, every holder of voting shares has the right to vote one vote per share in whichever way he or she chooses on any issue brought to the shareholders.

There are, however, some restrictions and presumptions that slightly vary the application of this rule. In order to prepare an accurate list of shareholders, the corporation is empowered in subdivision 1 to set a date on or before which must have persons purchased or otherwise acquired shares in order to vote their shares and be entitled to receive notice. This date may not be more than fifty days prior to the meeting; fifty days is sufficient for the preparation of such a list, especially if the share register is a computer-stored list.

All references to the practice of "closing the books" of the corporation have been eliminated. This practice is no longer justified (or used) now that the maintenance of share registers has progressed from written entries to computer processing. Of course, for those corporations small enough to use manually updated share registers efficiently, "closing the books" has never really been necessary.

Many persons acquiring shares through a broker-dealer or maintaining agency accounts with banks and trust companies only a beneficial interest. The shares themselves may be registered in "street" name, that is, in the name of a brokerage house, a bank or its nominee. Some of the problems that stem from this division of beneficial versus record ownership include both the delay of notice to the beneficial owner when the notice goes first to the record owner and then to the beneficial owner (see Rule 14b-1, promulgated under the Securities Exchange Act of 1934), and the need for a beneficial owner to obtain a proxy from the record holder in order to vote his or her shares. These problems can be avoided by treating the beneficial owner as the record holder for any or all purposes. Subdivision 2 permits the board to establish procedures to permit a broker, voting trustee or other record holder holding shares for other

persons, to give the corporation a listing of those beneficial owners for the purpose of treating those beneficial owners as record holders for any or all purposes the board may determine. For those purposes, the persons listed by the broker, dealer, bank, nominee voting trustee or other person are the record holders.

Subdivision 3 permits the usual one vote per share rule to be varied so that different classes may have different voting power. E.g., class A shares may have three-quarters of a vote per share, while class B shares may have two votes per share (or no votes per share).

Subdivision 4 permits the articles to specify that creditors or others have a right to vote. Certain creditors or bondholders may insist on an amendment to the articles permitting them to vote under certain circumstances as a condition to financing, refinancing, or reorganizing the corporation. Any provision validly added to or originally part of the articles permitting these persons to vote is enforceable in the courts of this state unless it violates some other section of this act.

Subdivision 5 sets forth a new rule for owners of jointly-held shares. Any of the persons owning shares jointly may vote those shares unless another joint owner has given the corporation written notice denying the authority of the first owner. There are two reasons for adopting this rule. First, it removes the uncertainty on the part of the corporation as to the validity of the vote by putting the burden on the joint owners; the corporation may avoid liability for possible invalidity of the action in question by accepting a vote without notice of denial. This prevents the corporation from becoming entangled in what is basically a squabble betwen joint owners. Secondly, joint owners have an interest in all the shares they jointly own. To permit one joint owner to vote all the shares in the face of a written denial of authority to vote those shares permits him or her to override the desires of other joint owners; to break up the ownership proportionally for voting purposes may involve the corporation in the dispute between joint tenant. Both are undesirable; on the other hand, a clear, enforceable rule which permits the voting of these shares while it secures both the rights of the joint owners and the right of the corporation to certainty, cannot fit all the possible cases. In this context considered Del. Code. Ann. Tit. 8, Sec. 217(b) was considered and found to be inadequate, because it splits up the voting power among joint owners. Of course, if joint owners agree to disagree, they may always cast their votes in proportions that reflect that disagreement, as long as they all agree to the vote, e.g., 40 votes in favor, 40 votes against.

Subdivision 6 provides a presumption that any shareholder who votes simply "yes" or "no" is deemed to be voting all of his or her shares in that manner. This is intended to protect the corporation from possible attack for accepting such votes and reflects no more than the reasonable expectation of the corporation; any shareholder who votes without indicating a desire to vote less than all of his shares has no right to maintain that a partial vote was intended.

Section 72

SOURCE: Cal. Corp. Code, Section 703; MBCA Section 33, Paragraphs 6 to 8

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.26, Subdivisions 6, 8, 9 and 10

CHANGE FROM FORMER LAW: Under this section, shares of the issuer held by a non-related corporation may be voted by its CEO

or other legal representative. Under Section 301.26, only the president, the president's proxy, or a person appointed by the board could vote those shares. Under this section, shares of the issuer held by subsidiaries may not be voted; Section 301.26 was silent on this issue. Shares held by the issuer or its subsidiaries for others in a fiduciary capacity may be voted if the beneficial owner authorizes the subsidiary or issuer to vote in a particular way. Legal representatives may vote shares held by them for others under this section, except that a trustee of a trust may not vote shares unless they are registered in his or her name. Section 301.26 gave fiduciaries a broad right to vote shares held in those capacities. Pledgors may vote their shares until the pledgee becomes the record holder. Section 301.26 was silent on this issue.

GENERAL COMMENT:

This section provides clear guidelines for the voting of shares by particular types of legal representatives. It also expands the rather sketchy grant of power to "fiduciaries" in Section 301.26, subdivision 6.

Subdivisions 1, 2 and 3 all serve the same purpose. They regulate the voting of shares owned by corporations. Subdivision 1 regulates the voting of shares owned by non-related corporations. Those shares may be voted only by the chief executive officer or other legal representative (section 1, subdivision 1b) of the shareholder. The CEO or other legal representative may also comply with this provision by signing the proxy card, if any, solicited for the meeting or by otherwise appointing a proxy.

Subdivision 2 prohibits the voting of shares held or owned by subsidiaries of the issuer except for shares held in a fiduciary capacity (see subdivision 3). Minnesota Statutes, Section 301.26, Subdivision 10, prohibited the voting of shares of the issuer owned by it as treasury shares. Under section 86 of this act, any shares acquired by the corporation become authorized but unissued shares which are, by definition, non-voting. However, there is no reason why a "subsidiary", that is, a more than 50 percent owned corporation (see section 1, subdivision 32) should be available as a means to avoid the prohibition against giving the management voting power based on shares purchased with resources belonging to the corporation (and, therefore, to the shareholders). Therefore, the voting of an issuer's shares by a subsidiary is also prohibited.

Subdivision 3 serves the same purpose. The shares held by a corporation on behalf of others in a fiduciary capacity are shares which are actually held for the convenience of the beneficial owner; voting the shares in any way other than at the request of those beneficial owners is an abuse of the corporation's duty to those beneficial owners.

Subdivisions 4, 5 and 6 govern natural persons acting as representatives for other persons or for corporations. Subdivisions 4 and 5 are taken from the Model Act, and the commentary to those subdivisions which appears below owes a great deal to the commentary appearing at 1 Model Business Corporation Act Annotated 712 (ALI-ABA, 1969, Philadelphia).

Generally, only record holders have the right to vote. This general rule does not take into account the rights at common law of certain fiduciaries (personal representatives, administrators, executors, guardians ad litem, conservators, or attorneys in fact) to vote these shares. There are several qualities which all of these fiduciaries share: they are appointed by courts; they are appointed to fulfill certain relatively narrow and discrete responsibilities, and the court appointment usually contains a clear statement of their authority; the relationship between the fiduciary and the shareholder is not a continuing relationship but is relatively short-lived; and the duties of these positions frequently

include voting the shares. These controls make it unnecessary to restrict these particular fiduciaries in voting the shares. Trustees of a trust (as opposed to trustees in bankruptcy) and custodians often do not possess the four listed qualities. Receivers and trustees in bankruptcy lie somewhere between the two groups, and their authority is a matter for the appointing court to decide.

As to pledgees, it seems fair to require that the shareholder vote the shares until the corporation is made aware of the actual change of registration of ownership. If the pledgee wishes to vote the shares, he or she may require a proxy as part of the pledge (see section 70, subdivisions 1, 2). The corporation has no way of knowing who may vote the shares, other than the share register and the proxy mechanism, and special arrangements for pledgees are matters for the parties to the pledge and should not be included in the statute.

Section 73

SOURCE: Minnesota Statutes, Section 301.26, Subdivisions 4 and 5; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.26, Subdivisions 4, 5 and 7.

CHANGE FROM FORMER LAW: The only substantive changes from Section 301.26 which appear in this section allow several joint owners to appoint a proxy unless another of the joint owners either notifies the corporation that the first joint owner does not have the authority to appoint a proxy, or appoints a different person as proxy. This section also allows the corporation to accept the votes of proxies without the necessity of determining that the vote is within the authority of the proxy. This section also covers certain areas on which Minnesota Statutes, Section 301.26 was silent.

GENERAL COMMENT: Although no definition of proxy appears in the Securities Exchange Act of 1934, it is clear from the language of Section 14(a) of that Act and Rules 14-a-1 to 14-a-12 promulgated under that Act that the "proxy" referred to there is the instrument in which the shareholder authorizes the casting of the vote. This section makes no use of that definition; instead, the term "proxy" is used in the way in which it has been traditionally used in Minnesota Statutes, Section 301.26, and means the person appointed to have that authority. This is also a variant of the primary dictionary definition (Webster's New Collegiate Dictionary 922, 1979, Springfield, Massachusetts), as well as an accepted, though elderly, legal definition. Cliffs Corporation v. U. S., 103 F.2d 77, 80 (1939): Black's Law Dictionary 1102-1104. The "appointment" referred to in the section is the equivalent of the "proxy, consent or authorization" referred to in the 1934 Act.

Any written appointment of a proxy signed by the shareholder and delivered to an officer of the corporation is valid by its own terms at all times after that delivery. The appointment may include a general grant of authority to the proxy, or it may require the proxy to vote the shares in a particular manner.

A shareholder may appoint any person to be a proxy. A joint owner of shares may appoint a proxy without the consent of the other joint owners, as long as those owners do not notify the corporation of ether the appointment of a different proxy or a specific denial of authority to appoint a proxy, in which case no proxy shall be appointed unless all joint owners sign the appointment. This is consistent with the policy on voting jointly-owned shares at a meeting.

This section makes proxy appointments valid for 11 months in the absence of any provision for a longer period in the appointment. This 11 month period appeared in Chapter 301, under which the corporation was required to hold annual shareholder meetings. It appears in this section because several of the reasons for its existence still apply under this act. First, regular meetings may well be held annually, at the option of the corporation. Secondly, the renewal of the appointment can, with a presumptive 11 month period, become a more regular, nearly annual event. This regularity may make the proxy renewal an event of more importance to the shareholder, while the expiration of the authority of the proxy, absent renewal or a new appointment, ensures that the shareholder will not give the proxy a continuing right to vote the shares through mere negligence. However, the shareholder may appoint the proxy for any period the shareholder desires. Some definite period, e.g., ten years, must be stated in the appointment, though, unless the appointment is coupled with an interest, in which case the proxy may be indefinite or permanent.

The shareholder may terminate the appointment at any time, in one of three ways. The shareholder may file a notice that the appointment has been terminated, or may file an appointment of a different proxy, which acts as an implied termination. In either case, all prior appointments are immediately null and void as soon as the notice or the new appointment is delivered to an officer of the corporation. The shareholder may also terminate the proxy by appearing at the meeting and filing a signed written notice of termination (the text of which may be as simple as "I terminate all proxies," and which need not be notarized) with any of the officers present at the meeting.

There is one exception under subdivision 3 to the power to terminate the authority of the proxy at will. If the appointment of a proxy is coupled with an interest, it the authority of that proxy may not be terminated unless the termination is provided for by an agreement between the shareholder and the proxy or as part of the interest. An appointment "coupled with an interest" means any appointment of a person as a proxy under any shareholder voting agreement under section 76, or any appointment made as part of an agreement, or any appointment of a party to an agreement under which any consideration is transferred to either a shareholder or a corporation in exchange for shares or rights to purchase shares, a promise to purchase shares, services to be rendered, or in exchange for credit or loans. Unless explicitly stated in such an appointment that the appointment is not coupled with an interest, it will be deemed coupled with an interest and the terms of the appointment may provide that it is irrevocable and of indefinite term.

Under subdivision 4, the corporation may continue to accept the vote of the proxy, even after the death or incapacity of the person appointing the proxy, if it has not received written notice of that death or incapacity. Upon receiving such notice, however, the corporation may no longer accept votes cast by the proxy unless the proxy has authority to vote the shares under a new, valid appointment. The corporation should be protected against liability in the absence of any notice that would give them reason to disregard the apparent authority of the proxy. The same principle is the basis for subdivision 6.

Subdivision 5 governs the situation where the shareholder has appointed more than one person as a proxy. In that case, the authority of any single proxy to vote the shares depends upon the instructions contained in the appointment. If the instructions are specific, any of the proxies may vote the shares in the manner set forth in the instructions. If the instructions are not specific with regard to the issue in question, or if the shareholder has given a grant of general authority to vote the shares to the proxies, the shares shall be voted only if a majority of the proxies, or, if there are two proxies, both of them, can agree on the manner in which the

shares are to be voted, in which case all of the votes that those shares represent shall be cast in that manner. The requirement that a majority of the proxies agree relieves the corporation of the burden of deciding between the right to vote of two or more equally legitimate proxies votes. The corporation should not be forced to choose between proxies and, in choosing, open itself to attack and possible liability for accepting the vote.

Subddivision 6, like subdivision 4, protects the corporation from liability for accepting a vote in possible violation of a condition or restriction of which the corporation is not aware. In order to put the corporation on notice as to the restrictive condition, the instrument appointing the proxy must set forth the conditions, if any, under which the authority of the proxy is limited. If the instrument gives the proxy specific authority in relation to one or more separate and specific issues but fails to bestow a general authority on the proxy, the absence of that authority is a total restriction on all issues except those specifically addressed by the instrument. Although the corporation is protected from liability in the absence of notice, the proxy remains liable for actual damage, suffered by the shareholder or the beneficial owner arising from the wrongful exercise of or failure to exercise, the authority.

Section 74

SOURCE: Minnesota Statutes, Section 301.27(1); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.27

CHANGE FROM FORMER LAW: The requirement that a copy of the voting trust agreement be made available for inspection by shareholders or holders of voting trust certificates formerly imposed by Minnesota Statutes, Section 301.27, Subdivision 2 has been dealt with in section 77. The presumption formerly listed in Minnesota Statutes, Section 301.27, Subdivision 3, clause (1), is covered in section 72, subdivision 4; clause (2) is covered in subdivision 2 of this section and section 71, subdivision 5; and clauses (3) and (4) are no longer explicitly covered.

GENERAL COMMENT:

This section continues the policy of Section 301.27 validating voting trusts. These trusts resemble shareholder voting agreements in that both are devices which control the voting of shares, but differ in a very important way in regard to the actual ownership of the shares. In the voting trust, the ownership of the shares is transferred to the trustee of the voting trust, and the trustee of that trust is treated by this chapter as any other trustee is treated, while in the shareholder voting agreement under section 75, the shareholder retains ownership.

The 15 year maximum period of duration for voting trusts has been retained because shortening the period might result in the premature termination of voting trusts in existence at the time this chapter becomes effective with respect to that corporation. There is no reason to extend the period beyond 15 years; indefinite voting trusts are not consistent with the policies of disclosure and accountability (for a similar application, see section 73 on the duration of proxy appointments). The one exception to this 15-year maximum involves the trust as part of an agreement involving corporate debt. This situation is similar to the situation where a proxy appointment is coupled with an interest under section 73; the two are treated similarly for purposes of possible length of the term, that is, the voting trust may by its terms extend beyond

15 years, if the indebtedness from which the trust arises is or will be outstanding after a 15-year period, just as a proxy granted under similar circumstances could be irrevocable.

The voting trust may, however, be terminated prior to the expiration of the 15 year period if the owners of a majority of the beneficial interests vote to terminate. This power to terminate may be restricted by the voting trust agreement in any manner, including making the trust irrevocable for the maximum 15 years, or for the term of the indebtedness, but the restriction must be stated in the trust agreement.

Subdivision 2 merely treats the trustees as record owners, consistent with the transfer of shares into their names, by subjecting them to section 71, subdivision 5.

Section 75

SOURCE: MBCA, Section 34, Paragraph 2.

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: Minnesota law regarding the validity of shareholder voting agreements has been decisional. Hart v. Bell, 222 Minn. 69, 76-79 23 N.W.2d 375, 379-81 (1946) (holding voting agreement restricting payment of dividends valid) generally validated voting agreements, but no other Minnesota decisions have set forth the details of the rules to be applied to these agreements. This section gives the shareholders a statutory right that is similar to but broader than the judicially recognized right to enter into these voting agreements.

GENERAL COMMENT:

Any number of shareholders or, if no shares have been issued, subscribers may become parties to a written agreement governing the voting of the shares owned or to be owned by them. Although the statute speaks of subscribers as parties to agreements only if no shares have been issued, a subscription agreement could require signature of a prior shareholder voting agreement as a condition to the issuance of shares under that subscription agreement to a new shareholder.

The agreement is valid and binding upon all those who sign it, even though less than all or even less than a majority of, shareholders are parties to the agreement. Successors to or transferees of the shares of parties are not bound by the agreement unless they become parties to the agreement. This is consistent with the notion that the voting agreement is based on individual contract and not on status as a shareholder.

The agreement may cover any matter which affects the corporation, including the voting of shares owned or controlled by the parties in a manner designed to insure that the corporation follows a particular policy. This is consistent with the rationale of Hart v. Bell, supra at 78, 23 N.W. 2d at 380.

The agreement may be enforced in any way set forth in the agreement, but in the absence of such a provision, the only method of enforcement would be action in court for damages or equitable relief under section 79 or general contract principles. Thus, the person drafting or agreeing to the voting agreement should be aware of the possible methods of enforcement, such as specific performance, injunctions against the voting of shares in violation of the agreement or against actions authorized because of violations of the agreement, suit for damages, or

arbitration.

Sections 73 and 74 do not restrict such a voting agreement. Section 74 does not apply at all, in recognition of the difference between the voting agreement and a trust, and section 73 may be modified (or ignored) as specific provisions of the voting agreement may direct. This follows from and emphasizes the contractual nature of the voting agreement.

Section 76

SOURCE: Section 13, Proposed Close Corporation Supplement, MBCA; New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: There is no Minnesota statutory or case law on this subject; although it is conceivable that a Minnesota court might consider such an agreement to be valid even in the absence of this section, the traditional position of the courts was to strike such agreements down as impermissable infringements upon the powers of the board. However, the trend in recent years has been to validate these agreements.

GENERAL COMMENT:

This section permits the shareholders to bind themselves and the corporation to certain courses of action on issues formerly thought to be solely within the discretion of the directors because of their managerial nature. As in the case of the shareholder voting agreement, subscribers are permitted to enter into these agreements, before the corporation has issued shares but, again, a subscription agreement may well require signing a control agreement as a condition to the issuance of the shares. The control agreement may cover any matter connected with the corporation.

Subdivision 2(a) lists a number of items that may be covered by the agreement. The subdivision merely presents suggestions to the practitioner or shareholder. The only requirement is that all of the persons holding shares or, if no shares have been issues, subscribing for shares of the corporation agree in writing to be bound by the agreement. An agreement which is defective in this regard should be treated as a shareholder voting agreement (see section 75) enforceable only in the manner and as to matters appropriate to such an agreement.

Under subdivision 2(b) those who sign the agreement are bound by it but all others who know that the agreement exists are also bound, even though they may be mere successors to or transferees of the original owners of the shares. As long as the agreement is referred to on the share certificate or transaction statement, the holder or pledgee of the shares has knowledge of the agreement and is bound. The agreement will also be valid against creditors of the corporation if they have actual knowledge of the agreement.

The control agreement, if the corporation has one, is an important corporate governance document, and should be available to those connected with the corporation such as the shareholders. Subdivision 2(c) implements that policy, as does the classification in section 77 of the agreement as a document which the shareholders have an absolute right to see.

The function of the board of directors, as stated in section 26, is to manage and direct the corporate entity, and a director is normally responsible for his acts in that capacity. However, this section, like section 23, subdivision 2, permits the shareholders to bypass the directors. Under those circumstances, the responsibility for the acts bypassing the

directors should be placed solely upon those exercising the management power. Subdivision 3 does exactly that. Of course, a director who is also a shareholder will not be able to use this section to escape liability because any action taken by that person as a shareholder will result in the same liability on the director as any acts as a director. Similarly, if the agreement provides for shareholders to bypass the board by shareholder vote, only those shareholders who authorize that bypass are liable; shareholders who do not authorize the bypass or a delegation of the power to bypass are not exercising management powers and are not liable.

Subdivision 4 merely makes it clear that the validity of other shareholder agreements remains unaffected by this chapter. An agreement not covered by this section may be valid as an agreement under section 75 or as an agreement relating to any or all corporate matters.

The practitioner or layman should be very careful, when using this type of agreement, to ensure that taxation as an association is not lost under Treas. Reg. 301.7701-2. An agreement under this section might be construed, depending on its terms, as a limitation upon free transferability (see section 64), centralization of management, or continuity of life. However, although not to be used or cited as precedent (see I.R.C. Section 6110(j)(3)) in LTR 7921084 (CCH, 1979), the service rules that any legal entity incorporated under local law which has continuity of life will be a corporation for tax purposes.

Section 77

SOURCE: Minnesota Statutes, Section 301.34; Del. Code Ann. tit. 8, Section 224

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.34

CHANGE FROM FORMER LAW: This section increases the number of documents required to be kept by the corporation at a specified place by adding to current requirements the following documents: the latest periodic financial statement of the corporation; the names and business addresses of the directors; voting trust agreements, if any; and shareholder control agreements, if any. These documents are to be kept at the principal executive office, not the registered office (unless the principal executive office is not in this state, in which case the documents must be available at the registered office. Under this section, the shareholder has an absolute right to see and copy all documents required to be kept at the principal executive office or the registered office by subdivision 2; Minnesota Statutes Section 301.34 required the shareholder to show a "proper purpose" prior to inspection. The cost of copying is also covered, for the first time, in this section. Lastly, the section adds a subdivision on the use of computers or other systems for the storage of documents.

GENERAL COMMENT:

The basic structure of the former Minnesota provision has been retained, but the number of documents available to the shareholder and access to those documents have been greatly increased to facilitate the high disclosure philosophy of this act. However, the type of documents required has not changed; all of them could be described as "directory information". Thus, the cost of formulating and maintaining these documents will not increase greatly.

Subdivision 1(a) continues the present requirement that the corporation maintain a share register. The location of the register is left to the convenience of the board, which may

wish, for example, to keep the register at the office of its transfer agent. The corporation must take steps to assure access to the share register to those entitled to access under subdivision 4.

However, the corporation may, if it chooses, keep a separate record of the dates on which shares were issued to particular individuals. This record is not part of the share register, and the shareholder must show a proper purpose before inspecting this document.

The corporation must also maintain a number of other records for inspection by the shareholders. Most of these records deal with matters of public record, such as the articles, with information generally distributed to shareholders such as minutes of meetings or reports to shareholders, or with agreements that bind or control the corporation. Subdivision 2 requires the corporation to make these records available at someplace in this state within ten days after receipt of a written demand to inspect. This section is much more detailed about what must be maintained or made available than Minnesota Statutes, Section 301.24 which required the maintenance of far fewer documents for inspection and which was fairly vague about those that were required.

Subdivision 3 requires that the corporation keep financial records. No particular documents or methods of recording financial data are required by this subdivision, which corresponds to subdivision 4 of 301.34. The subdivision merely points out that all financial data should be recorded and that those records should reasonably reflect the financial status of the corporation. The term "appropriate and complete" is not intended to require audited records, the use of generally accepted accounting principles, or any other particular method of record keeping. While a simple ledger of T-accounts may be appropriate for some small corporations, many corporations may need to follow GAAP. The facts of each situation must be carefully analyzed to see what is appropriate, but it is clear that this subdivision does not require any new or additional corporate records beyond those currently in normal use in this state.

Subdivision 4 is the heart of this section. It grants an absolute right of access to certain documents to shareholders or holders of voting trust certificates. This right of access is absolute and may be enforced in a proceeding under section 79. The only limitation on that access is that the examination or copying of corporate documents must be done at a "reasonable time". Any time during the normal office hours of the principal executive office or the registered office is a "reasonable time"; other times may also be reasonable, depending on the circumstances. The absolute right of access extends only to documents listed in subdivisions 1(a) and 2. Any other corporate documents may also be examined and copied by shareholders or voting trust certificate holders, if they first show a "proper purpose". The Delaware definition of "proper purpose" is adopted along with the the ample Delaware case law interpreting that definition. Examples of a "proper purpose" are: valuation of shares; determination of management competence; and communication with other shareholders for a number of purposes including proxy solicitation and the encouragement of approval of pending fundamental corporate changes.

The adoption of the Delaware definition of proper purpose, in no way changes the definitions of proper purpose set forth in Founes v. Hubbard Broadcasting, Inc., 302 Minn. 471, 473, 225 N.W. 2d 534, 536 (1975), and State v. Crookston Trust Co., 222 Minn. 17, 22 N.W. 2d 911 (1946) (inspection to aid valuation of shares and to evaluate conduct of management to determine the effect on the financial condition of the corporation held for proper purpose) or in Nationwide Corporation v. Northwestern National Life Insurance Co., 251 Minn. 255, 87 N.W. 2d 671

(1958) (inspection of share register of an insurance company governed by Chapter 300 permitted for purpose of communicating for the purpose of soliciting proxies where held proper to solicit proxies), but the standard set forth in State ex rel. Pillsbury v. Honeywell, 291 Minn. 322, 327, 191 N.W. 2d 406, 410 (1971) of "investment return" ought to be interpreted broadly.

It is also clear that there are occasions on which the right of inspection ought to be supervised by the court, in order to prevent abuse of that right through the disclosure of trade secrets or other confidential information. This section in no way interferes with or limits the power of a court to supervise inspection through the use of protective orders as suggested in Founes, supra at 475, 225, N.W. 2d at 537.

Subdivision 5 establishes who shall bear the cost of copies made pursuant to subdivision 4. The cost of copying can be a subtle yet effective way of rendering the right of inspection nugatory. By requiring the corporation to bear this expense for the items listed in subdivision 2, the doors of disclosure are opened wide for the inspection of basic governance documents. However, keeping in mind the cost of lengthy share registers, the inspecting party must show a proper purpose in order to get a free copy of the register. Otherwise, the inspector, if the corporation requests payment, must pay the cost of the copy, even though the shareholder is entitled to one under subdivision 4. The corporation may require reasonable payment for all other copies of all other documents.

Computer records are the main subject of subdivision 6; their use is validated for all purposes for all corporate records, as long as they are converted upon proper request. A person "entitled" to see the records is one who has either an absolute right under subdivision 4(a), or who has shown a proper purpose under subdivision 4(b). The cost of conversion is a copying cost in those cases where the record is made legible visually by means of a computer printout, therefore the cost is governed by subdivision 5.

Section 78

SOURCE: MBCA Section 52

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.35

CHANGE FROM FORMER LAW: This section requires the corporation to distribute financial statements to all shareholders once every year; Minnesota Statutes, Section 301.35 required distribution of those statements only upon request of a shareholder. Under this section, the financial statements are to be accompanied by a description of the basis or method of presentation and any changes in that basis. Section 301.35 required that certain information concerning the holders of convertible securities and share options and the consideration paid by shareholders for their shares had to be included in the financial statements; this information is not required by this section.

GENERAL COMMENT:

The language of this section is taken almost word for word from section 52, paragraph 5 of the Model Business Corporation Act (MBCA). The exceptions are: first, that the financial statements must be prepared on the basis of "accounting methods reasonable in the circumstances", which does not necessarily require application of generally accepted accounting principles (GAAP); second, that the statements may be distributed by any means, not solely the U.S. Postal Service, as implied by the MBCA; and third, that if the statements are being prepared by public accountants and if the statements cannot be completed

within 120 days after the close of the fiscal year, the statements may be distributed after that time without violating this section, as long as they are distributed as soon as they are available.

By requiring only an accounting method "reasonable in the circumstances", small corporations are relieved of the expense of requiring GAAP, as illustrated in this excerpt from the MBCA comment to section 52, paragraph 5 of the MBCA:

> Many small corporations have never prepared a financial statement on the basis of generally accepted accounting principles ("GAAP"). A "cash basis" financial statement (often used in preparing the tax returns of small companies) does not comply with GAAP. Even closely held corporations that keep accrual basis records, and file their federal income tax returns on that basis, frequently depart in some respects from GAAP in preparing their financial statements. In light of these considerations, it is believed that it would be too burdensome on small or closely held corporations to require GAAP statements.
>
> 33 Bus. Law. 931, 932 (1978)

The Model Act did not use the "reasonable in the circumstances" standard at the time the above-quoted comment was published (1978), but did adopt that standard in other provisions during 1979, in its revision of legal capital provisions. This standard has been used throughout this act (e.g. section 85). What is reasonable for a small corporation, may be unreasonably lax, however, in a larger one. If a corporation already prepares statements according to GAAP, a that standard ought to be applied; in such a case, GAAP statements are probably the minimum level to be expected.

The second exception permits small corporations with few shareholders to hand deliver the statements or to distribute tham at shareholder meetings rather than mailing the statements.

The last exception is intended to insulate the corporation from liability for delays caused by the failure of a third party not under the control of the corporation, in this case the public accountant, to complete the audit of the accounts of the corporation within the 120-day limit otherwise imposed upon the corporation. The corporation must, however, forward the statements to the shareholders within a resonably short time after receiving the completed audit from the accountant.

Generally speaking, this section does not place a great burden on the small corporation. It merely shifts the burden of providing access to the financial statements from the shareholders to the corporation.

Section 79

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 316.03 and 316.04

CHANGE FROM FORMER LAW: Minnesota Statutes Sections 316.03 and 316.04 were restricted to certain fact situations and authorized only limited relief. This section gives the courts wide discretion in determining the relief to be granted and the situations in which relief should be ordered.

GENERAL COMMENT:

The sections in Chapter 316 cited above empowered the

courts the specific power to grant various relief with respect to the actions of corporate officers. Those sections did not contain a broad discretionary mandate to cover fact situations not described in those sections; moreover, the existence of a list could be construed under the doctrine of ejusdem generis as limiting the power of the court to fact situations in the same class as those listed.

This section recognizes that situations in which equitable relief may be appropriate are not readily definable in advance, as they often present novel fact situations, and it therefore adopts a broad rule which gives the court complete discretion in ordering whatever relief it deems just and reasonable in the circumstances.

Section 80

SOURCE: MBCA Section 80

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.40, Subdivision 1, and 301.44

CHANGE FROM FORMER LAW: This section greatly expands the occasions upon which a shareholder may dissent from a corporate action. Under Minnesota Statutes, Sections 301.40 and 301.44, a shareholder may dissent only upon the adoption of amendments to the articles substantially changing the corporate purposes or extending the duration of the corporation, or upon merger or consolidation of the corporation with another corporation. This section retains the right to dissent from a merger proposal and adds to it the right to dissent from proposed share exchanges, certain sales and transfers of assets not in the usual course of business, amendments of the articles which change the investment contract of the shareholder in one of four ways (altering a liquidation right, a redemption right, a preemptive right, or, in certain ways, a voting right), and on any other occasion permitted by the articles, the bylaws, or a board resolution. This section also permits a beneficial owner to dissent if he obtains the consent of the record owner, and permits a record owner to dissent with respect to less than all shares in his name if he dissents on behalf of a dissenting beneficial owner. No dissent is permitted if shareholder approval is unnecessary (short-form mergers or mergers where there is very little "dilution" of the voting power or the right to dividends of the shareholders of the surviving corporation), unlike Section 301.40 which was silent on the subject. This section also makes it clear that the right to dissent is the exclusive remedy in these transactions, absent fraud. Chapter 301 was silent on this subject also.

GENERAL COMMENT:

This is essentially a Model Act provision; the only variance from the Model Act in the language of this section is the exclusion in subdivision 1(b) of a sale in dissolution from those events upon which a shareholder may dissent. (Subdivision 4 is actually a slightly reworded version of MBCA Section 80(d)). Therefore, the Model Act commentary is in relevant part instructive.

The old provision was clearly incomplete. Almost all corporations now have general business purposes and perpetual duration; permitting dissent when those purposes or periods of duration are changed is an excessive remedy for a now inconsequential act. Consolidation has been eliminated as a corporate transaction, so that part of Section 301.40 is also inapplicable. Section 301.40 also failed to take into account new modes of transfer of ownership such as exchange of shares or sale of assets.

Subdivision 1 lists all of the events upon which dissenters' rights may arise; the word "may" is used because subdivision 3 and section 81 may operate to negate dissenters' rights. Four kinds of amendments to the articles are listed. The Model Act comment is very clear on the reasons for permitting dissenters' rights in these situations:

> The right of a dissenter to obtain payment for his shares is extended to embrace impairment of share rights by amendment for reasons similar to those which justify the grant of dissenters' rights in cases of merger, consolidation and transfer of assets. The grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered. The grant also enhances the freedom of the majority to make changes, because the existence of an escape hatch makes fair and reasonable a change which might be unfair if it forced a fundamental mutation of rights upon unwilling investors wthout giving them a reasonable alternative.
>
> The four types of amendment listed are those found in the New York law. Massachusetts lists the same four and adds restrictions on transferability. Michigan recognizes only the first two. Pennsylvania grants dissenters' rights in cases of canceling or impairing preferred dividends and eliminating cumulative voting rights.
>
> 33 Bus. Law. 2587 at 2594 (1978).

This section is especially protective when one considers that the majority required for amending the articles may be as little as a majority of a very small quorum. Because the law provides this protection against destruction of the elementary provisions of the investment contract, it permits the greater flexibility in the amendment of the articles set forth in section 14.

Under subdivision 1(b), dissenters' rights accrue upon a sale of all or substantially all the assets, except in certain cases. The section, in the words of the Model Act comment,

> . . . does not provide for dissent and payment where there is either a sale of assets pursuant to an order of a court, whether or not the sale is for cash, or a sale for cash to be followed by a distribution of the proceeds within a year. There is no reason, in either of such events, to permit any shareholder to attempt to realize more than he is entitled to receive in the normal course, or more than his fellow shareholders who do not dissent. A sale for a non-cash consideration, if not pursuant to an order of a court, entitles shareholders to dissent and demand payment. . . .

2 ALI-ABA Model Business Corporation Act Annotated 436 (Philadelphia, Pa., 1976). However, unlike the MBCA, this provision excludes dissolution from those events upon which dissenters' rights accrue, because dissolution is like the sale for cash followed by a distribution, an event which should not give rise to dissenters' rights. Dissenters' rights are only a means of protecting the shareholder against receiving an unfairly low portion of the actual value of a going concern, and for preventing transferees from profiting from beneficial side arrangements made at the expense of minority shareholders. In a dissolution, there is no going concern; the corporation is being wound up, and the assets of the corporation are being converted into the maximum value in the market place will permit. While this may not be the value that the shareholder thinks he ought to have received, it is the value placed upon the assets by the only reliable valuation mechanism in that circumstance.

Moreover, the cash proceeds of a sale in dissolution are divided proportionately among the shareholders in respect of the shares. It is not possible to increase the cash paid to one shareholder without decreasing the ratables paid to another shareholder. That result is unfair and unwarranted. If it can be shown that those conducting sales in dissolution either intentionally or negligently did not attempt to get the maximum value available, a remedy may lie against the liquidators for breach of duty to the corporation.

Subdivision 1(c) permits the exercise of dissenters' rights in the traditional merger, except in those mergers where no shareholder vote is required (subdivision 3). This exception is made because the two types of mergers where shareholder approval is not required are, first, short-form mergers where the corporation already owns the overwhelming majority of the shares and which do not lead to dilution of the power of the shares of the parent corporation, and, second, mergers under section 91, subdivision 3, which only slightly dilute the power of the shares of the surviving corporation. The shareholders of the disappearing corporation in a merger always have dissenters' rights.

Subdivision 1(d) permits dissent from an exchange of shares, a new transaction in which both corporate entities continue to exist but in which control of both entities shifts into the hands of one group of shareholders.

Finally, subdivision 1(e) permits the exercise of dissenters' rights in other cases to be a negotiable matter in the articles or bylaws, or a way to ease approval of a particular transaction. As the Committee on Corporate Laws said with respect to the MBCA counterpart:

> [T]his paragraph permits corporations to grant dissenters' rights in additional situations not governed by paragraphs (1) through (4), if the corporate action is so important that it is submitted either voluntarily or compulsorily to a shareholder vote. Granting dissenters' rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin. In situations where the existence of dissenters' rights would otherwise be disputed, it may place the question out of doubt.

The Model Act comment is also instructive as regards subdivision 2:

> [Subd. 2(a)] Dissent as to part of Holding
>
> When a record holder represents some benefiticial owners who want to dissent and some who do not, the rights of both groups can be honored only by letting the record holder dissent for some but not for others. . . . In order to reduce speculative use of dissenters' rights, the law now limits the splitting privilege to representation of different beneficial owners. A similar limitation has been introduced in the corporation laws of New York, Michigan, and Pennsylvania.
>
> [Subd. 2(b)] Assertion of Dissenters' Rights by Beneficial Owners
>
> The former law authorized the assertion of dissenters' rights only by "shareholders," who are defined in section 1, subdivision 29 as holders of record. However, a large fraction of publicly traded securities are held on behalf of their owners by nominees such as the Depository Trust Company, or in the "street names" of brokerage firms. It would be foreign to the purposes of these nominees to forward

> demands and participate in litigation on behalf of their clients. In order to make dissenters' rights effective without burdening nominees, beneficial owners must be allowed to assert their own claims. The law now authorizes such assertion.
>
> The beneficial owner is required to submit a written assent by the holder-of-record to his assertion of dissenters' rights. This requirement serves not only to verify the beneficial owner's entitlement, but also to permit the holder-of-record to protect any security interest in the shares. In practice, a broker's customer who receives a forwarded notice of a proposed corporate action, and who wishes to dissent, may request the broker to supply him with the name of the holder-of-record (which may be a house nominee, or the Depository Trust Company), and a consent signed by the holder. From that stage forward, the corporation will deal with the beneficial owner in the same fashion as with a record shareholder.

Lastly, subdivision 4 is a paraphrase of Model Act Section 80(d). The Model Act comment states

> When a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and can persuade a court of this opinion. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss.
>
> However, the fact that shareholders can get paid off does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts to carry through an action in violation of the corporation law on voting, in violation of charter clauses prohibiting it, by deception of shareholders, or in violation of a fiduciary duty the court's freedom to intervene is unaffected. Because of the infinite variety of situations in which unlawfulness and fraud may appear, the subdivision makes no attempt to specify particular illustrations. However, the presence or absence of a "business purpose" is not required, and is not a breach of fiduciary duty or a deception.
>
> Exclusivity clauses are found in several other acts, including those of California, Massachusetts, New York and Pennsylvania. These clauses vary in that some exclude other remedies when the cashout right is asserted, while others exclude them when the cashout right exists. The draft adopts the latter alternative, which is regarded as more exclusive. Clauses also vary in their enumerated exceptions to exclusivity. California lists (1) improper vote of shareholders, and (2) conflict with charter clauses. Massachusetts lists "fraud" and "illegality"; New York lists "fraud" and "unlawfulness." The proposed amendment adopts the New York formula. . . .
>
> 33 Bus. Law at 2596 (1978)

Of the few Minnesota cases on the subject of dissenters' rights, only one is of import with respect to the exclusivity of those rights, Bird v. Wirtz, 266 N.W. 2d 167 (Minn. 1978). That case impliedly approves the adoption of Singer v. Magnavox 380 A. 2d 969 (Del. 1977) (parent-subsidiary "long-form" merger held invalid as a violation of fiduciary duty where only purpose was to freeze out minority shareholders in the unreported lower court opinion. The intent of this section and section 89, subdivision 1, is to overrule that approval and eliminate business purpose as a reason to set aside corporate

transactions. (See the comment to section 89 for a more detailed discussion.)

Section 81

SOURCE: New, based on MBCA Section 81

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.40 and 301.44

CHANGE FROM FORMER LAW: This section requires the corporation to inform shareholders that a particular proposed corporate action may create dissenters' rights; Minnesota Statutes, Section 301.40 required only that the notice of meeting include an announcement that the action would be considered. This section requires a shareholder to file notice of intent to dissent before the vote but permits notice on the day of the meeting; Section 301.40 required that notice be given before the day of the meeting. This section requires an additional demand, on a form supplied by the corporation; Section 301.40 did not contain such a requirement. This section also permits the corporation to require deposit of certificates representing and restrict transfer of shares. The corporation must also remit to the dissenter the amount which it estimates to be the fair value of the shares, except in certain cases. This amount must be remitted to the shareholder as soon as a valid demand has been received or the action has been taken. Under Section 301.40, a dissenter did not receive any money until after the value had been determined by the appraisers. This section permits the shareholder to request further payment if he or she believes the fair value of the shares to be higher. If the parties cannot agree, the corporation must either file a petition asking the court to determine that value or pay the amount requested by the dissenter; Section 301.40 provided for appraisers to determine that value outside of court jurisdiction. The court may rely on the reports of appraisers, however. This section also permits the corporation to withhold all payments from shareholders who acquire their shares after public announcement of the transaction from which the dissenters' rights arise until after the fair value of the shares has been determined.

GENERAL COMMENT:

This section is based upon MBCA Section 81. It adopts the substance of the procedure set forth in that section, but the langauge of the MBCA has been extensively revised so that the section could be simplified without any loss of specificity.

The comment to the MBCA section is very helpful in explaining the intent behind the statute.

Subdivision 1(b) defines corporation as including successors because transactions giving rise to dissenters' rights are often consummated before the shareholder receives payment. However, this section applies with equal force against the successors.

Subdivision 1(c) defines the "fair value of the shares".

The time of valuation is set as immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as in the prior law. This comports with the plan of these sections to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

33 Bus. Law 2601.

The method of valuation is discussed later in this comment, in connection with subdivision 7.

Subdivision 1(d) defines interest:

The provision for interest is based on the elementary consideration that the corporation has the use of the dissenter's money, and the dissenter has no use of it, from the effective date of the corporate action until the date of payment. The provision on the interest rate permits the adjustment of rates to accommodate radical changes in prevailing rates such as have been seen in the past decade, and may recur in the future. The specification of the rate currently paid by the corporation provides a prima facie standard which should facilitate voluntary settlements. The date from which interest runs has been changed from the date of the shareholders' vote to the effective date of the corporate action, in conformity with the change of the valuation date.

33 Bus. Law 2601

Subdivision 2:

Since many shareholders have no idea what rights of dissent they may have, and how they should assert them, the corporation is required to notify shareholderss before they vote; otherwise, the reassurance to investors supplied by dissenters' rights would be illusory. This subsection applies only when a vote is taken, and is inapplicable to the mergers for which no shareholders' vote is required, as under section 91, subdivision 3 or section 93. If the corporation is uncertain whether or not the shareholders have dissenters' rights, it may comply with the notice requirement by stating that the shareholders "may have" these rights.

Notification of dissenters' rights was not formerly required by the Minnesota Business Corporation Act, but is required by federal proxy rules (in cases covered by them), and perhaps implicitly be "omission to state" clauses in state and federal securities laws. Notification provisions similar to that proposed exist in Rhode Island and in Delaware (since July 1, 1976); a much more elaborate one exists in Massachusetts.

33 Bus. Law 2602

Subdivision 3:

Where a shareholders' vote is called for, the shareholder must give notice of dissent before the vote is taken, so that other voters may know how much of a cash payment may be required. This notice also serves to limit the number of persons to whom the corporation must give further notices, including the technical details of depositing share certificates. This subsection, like the preceding, has no application to actions taken without a shareholder vote - notably in the merger under section 91, subdivision 3, or section 93.

The subsection departs from prior law in minor aspects. It requires that the notice of dissent be given before the vote is taken, rather than simply that it be at or before the meeting. It also required

that the shareholder not only object, but also state his intention to demand payment. This stiffening of requirements is more than balanced by the new requirement of subdivision 2 that the shareholder receive notice of what he must do to obtain payment.

33 Bus. Law 2602

Subdivision 4:

This subdivision requires the corporation to tell dissenters and potential dissenters when and where to file their demands for payment and deposit their certificates. In the usual case of an action submitted to the vote of shareholders, this will be sent only to those who gave notice of intention to dissent, and who refrained from voting in favor of the proposed action. In the case of a merger by absorption of a 90-percent-owned subsidiary, the notice will go to all minority shareholders of the subsidiary a copy of sections 77 and 78.

This subsection also requires that the corporation provide a form for demand, with a request for indication of the date when the dissenter's ownership was acquired. This information will permit the issuer to detect any major acquisitions made for speculative or obstructive purposes, and to exercise its right under subdivision 9 to defer payment of compensation.

Finally, the subsection introduces a procedure for dealing with uncertificated shares, which are authorized by section 56. The provisions for deposit of certificates are obviously inapplicable to such shares. Instead, the issuer is authorized by subdivision 4(b) to restrict their transfer, and is required by this subsection to notify the holders of any such intention.

The dissenter's demand for payment is a definitive posture which confirms a mere "intention" stated before shareholders were called on to vote. In cases where there is no vote, the demand is the shareholder's first statement of position. In either case, the filing of demands apprises the corporation of the cash drain which it must sustain if it proceeds with the proposed corporate action.

The deposit of share certificates, in cases where shares are certificated, is necessary in order to prevent dissenters from giving themselves a 30-day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this were possible, all sophisticated investors might be expected to file demands which they would not intend to carry through unless the price should fall. If the shares are not represented by certificates, the corporation can prevent such straddling by restricting their transfer, and is authorized by this section to do so . . . .

. . . The recognition of the possible existence of uncertificated shares, for which there are no certificates to be surrendered, is a new element in this subsection . . . . The section continues the dissenter as a shareholder until the effectuation of the proposed corporate change, at which time all shareholders' rights are transformed.

Subdivision 5:

This subdivision contains two fundamental departures from prior law. First, the corporation has to pay the dissenter within 60 days, or release his shares. Under prior law the shareholder had to wait 30 days before he or she could sue the corporation for the amount awarded by the appraisers. Under the amended law, if the corporation is unable to complete the corporate action with 60 days, it must release the shares, and give a new notice 60 days before it is ready to finalize its action. This requirement prevents the corporation from holding the dissenter indefinitely in a position where he has no possibility of realizing on his shares either by obtaining payment from the corporation or by selling them.

When the proposed action is finally effectuated, the corporation is required to make simultaneous payment of the amount which it estimates to be fair value of the shares. This provision contrasts with that in most corporation codes, which require merely an offer to pay. It is based on the supposition that since the dissenter's rights as a shareholder are definitively terminated, he should have immediate use of the money to which the corporation has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.

Since the shareholder must decide whether or not to accept the payment in full satisfaction, he must be furnished at this time with financial information, and with a reminder of his further rights and liabilities.

If, after returning the deposited certificates (or lifting transfer restrictions), the corporation wishes to effectuate the proposed changes, it may issue a new notice to demand and deposit certificates as authorized by paragraph (6).

Subdivision 6:

This subdivision also contains radical departures from prior law. The binding appraisal proceeding is not present. Instead, the dissenter who is not content with the corporation's remittance must state in writing the amount he will accept. He cannot by remaining silent force the corporation into the expense and delay of a judicial appraisal. Furthermore, if his supplemental demand is unreasonable, he runs the risk of bearing an assessment of litigation expenses under subsection (i). These provisions are designed to encourage settlement without a judicial proceeding.

A dissenter to whom the corporation has made a remittance must make his supplemental demand within 30 days in order to permit the corporation to make an early decision on initiating appraisal proceedings.

Second, if no remittance at all is made by the corporation, the dissenter may assert his rights by demanding a stated amount. He will become entitled to this amount under subdivision 7 if the corporation fails to institute appraisal proceedings.

Subdivision 7:

The conception of a judicial appraisal as the ultimate means of determining fair value is introduced here to replace the concept of binding appraisal without court supervision. If any shareholder requests supplemental payment and cannot subsequently reach agreement with the corporation on the fair value of the shares, the corporation must either within 60 days start a court proceeding requesting court supervised determination of that value or pay the sum requested as supplemental payment.

The proceeding must be commenced where the registered office is located, in order to permit convenient access to corporate records, if necessary. All dissenters requesting supplemental payment who have not settled with the corporation must be named as parties to the proceeding; in that way this proceeding is a class action. However, failure to name a dissenter as a party is not intended to void the proceeding unless the court finds that the failure results in a material undervaluation of the fair value. The court has complete control of the proceedings and may use any valuation method or combination of methods it sees fit, as long as the court finds the result to be the fair value of the shares as of the effective date of the action. No method is recommended because the different methods of measuring value (market, book, replacement, capitalization of earnings, etc.) are neither right nor wrong, in the opinion of the Task Force, but merely appropriate indifferent situations. Because of the highly technical nature of valuation proceedings, the court may enlist the aid of appraisers, and may, for all intents and purposes, permit them to find the fair value of the shares.

In view of the provision for preliminary payment by the corporation (subdivision 5), the subject of judgment has been changed from the full value to the difference between the preliminary payment and the appraised value. The former clause requiring surrender of certificates is omitted, in view of the procedure for prior deposit of dissenters' certificates, subdivision 4(b).

33 Bus. Law. 2604

Under subdivision 8(a), appraisal expenses and the expenses of the court proceeding are charged to the party, if any, that caused the costs and expenses to be needlessly incurred. This may be a corporation which by its failure to offer a price equal to the fair value, has burdened the judicial system with the proceeding, or a dissenter, who in requesting supplemental payment, has acted arbitrarily, vexatiously, or not in good faith.

Similarly, expert fees and counsel fees may also be assessed under 8(b). No attempt has been made to define when a "corporation has failed to comply substantially with this section", as the failure may be merely a procedural omission, or it may be the offering of an estimated fair value which substantially underestimates the actual fair value of the shares. In either case, the discretion of the court, in light of the facts of each case, should control. The purpose of this subdivision is to provide an incentive for both sides to settle without resorting to the judicial appraisal mechanism.

Paragraph 8(c) is an innovation, analogous to the established practice of awarding attorney's fees in class and derivative actions. An amendment with similar effect was adopted in Delaware in 1976.

Subdivision 9 treats shareholders who acquired their shares after announcement to the public in a different manner.

> At the corporation's option, holders of these shares get an offer which must be paid as soon as they agree to accept it in full satisfaction, rather then the immediate payment granted to holders of previously acquired shares.
>
> If the right of immediate payment were granted unconditionally to after-acquired shares, speculators and obstructionists might be tempted to buy shares merely for the purpose of dissenting. Since the function of dissenters' rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to buyers who knew or could have known about the proposed changes.
>
> Corporations are given discretion to withhold or not withhold immediate payment for after-acquired shares. They may be expected to withhold immediate payment only when the circumstances clearly indicate a speculative or obstructionist maneuver of substantial proportions. In most cases, consideration of simplicity and harmony will dictate making immediate payment for after-acquired as well as pre-acquired shares.
>
> The date used as a cut-off must be one on which essential terms were announced. The cut-off cannot be set at an earlier date, such as the first public statement that the corporate action was under consideration.

33 Bus. Law 2605

Section 82

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.32

CHANGE FROM FORMER LAW: This section permits loans to or guaranties for any person or entity provided that certain procedural safeguards are met. Loans and guaranties to subsidiaries, other related organizations, organizations with which the corporation has business relationships, and organizations to which the corporation could make donations are permitted by this provision. Any loan in the regular course of business is permitted. Loans to officers and employees of the corporation are permitted, as they were under Minnesota Statutes, Section 301.32. Other loans are permitted if approved by the holders of two-thirds of the outstanding shares.

GENERAL COMMENT:

At common law, corporations could not make loans, or become sureties, or loan guarantors without some express authority. However, the power of the corporation to loan money to those persons or businesses connected with the corporation is a useful tool for the protection of the economic interest of that corporation and a useful incentive with which to attract top management or assure future growth.

This section recognizes that usefulness by permitting the broad range of transactions listed in subdivision 1. Three types of transactions require only board approval: those "in the usual and regular course" of business, those involving economically related corporations or permissible charitable donees, and those involving officers and employees. Even in these transactions, board approval is not required for every transaction. The board may approve one or more general classes of loans, guaranties, or suretyships and may delegate to a board committee or to one or more officers the power to enter those transactions.

Transactions "in the usual and regular course of business" are those loans, guaranties, or suretyships that are part and parcel of one of the regular streams of commerce of the corporation. For example, if the corporation operates a finance company (or a pawnshop or any loaning operation between the two), the loans made by the corporation in those operations are within this exception.

Transactions with economically related organizations also need receive only board approval. The ability to bolster the finances of a related corporation, (see section 1, subdivision 24), a parent, affiliate ('brother-sister' corporation), or a subsidiary, is important because these related corporations are often part of one economic unit within which artificial distinctions should not prevent internal transfers of funds. Similarly, a corporation may have an interest in or part-ownership of another corporation. In order to protect its financial stake in that organization, the corporation may wish to loan money to or guarantee the debts of that organization in order to stimulate the organization. This provision permits those actions. The corporation may also be financially benefited by aiding an organization which is a key supplier or customer of the corporation; this section permits a loan to or guaranty of loans of or suretyship for those organizations which have a "business" (i.e., trade) relationship with the corporation. Finally, loans to organizations described in section 21, subdivision 11 are permitted as a form of donation.

The third class of transactions which require only board approval are loans to, guaranties of, loans to or sureties for officers or other employees of the corporation including those who are directors. "Outside" directors are excluded from this group because they are selected as directors of the corporation because of their independence. This independence might be compromised by the existence of loans or guaranties from the corporation. However, in the cases of officers and employees, the loan or guaranty can be a valuable factor in the retention of experienced management or the hiring of promising personnel. The board may make these loans for any purpose, as long as it reasonably expects the corporation to directly or indirectly benefit from the transaction through better performance by currect employees or better personnel.

All other loans, guaranties, or suretyships must be approved by the board and by the holders of two-thirds of the outstanding shares. By requiring this very high majority for approval, loans for purposes which clearly do not benefit the corporation may be prevented, unless the shareholders approve. One interesting case may arise where one shareholder controls over two-thirds of the outstanding shares, but is not a director or officer, and therefore is not subject to the rule of section 42. However, where there is such an interested beneficiary of the loan or guaranty the courts are free to devise relief under section 79 that fits the situation.

Section 83

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: This section authorizes corporations to advance funds to officers or directors to pay for the reasonably foreseeable expenses of their offices. Board approval is not required for an advance. No prior statute or case law dealt with this topic.

GENERAL COMMENT:

This section removes any uncertainty which may have existed regarding the authority of the corporation to make advances. These advances may be made only for legitimate business expenses or personal expenses required by business purposes (e.g., moving expenses). Although board approval is not required, corporations are well advised to establish clear procedures for obtaining these advances in order to avoid charges of corporate waste.

Section 84

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.095

CHANGE FROM FORMER LAW: This section represents a new approach to indemnification. Indemnification is available only if the person to be indemnified meets the five criteria set forth in subdivision 2(a). However, if the person meets those criteria, and if the articles or bylaws do not prohibit or limit indemnification the corporation must indemnify that person, unlike our current law which is permissive. Indemnification need not be ordered by a court in a derivative suit, contrary to the situation under Section 301.095 which required court approval of indemnification in those suits. The person requesting indemnification may elect to appeal an adverse decision on the issue of whether the criteria have been met to a court, however, if an adverse determination or indemnification is made or if no determination is made within 60 days after the suit for which indemnification has been sought has been terminated or after an advance has been requested. Advances of expenses shall be made if the person requesting payment affirms that he or she has met the criteria and undertakes to repay the advance if it is found that the criteria have not been met, and if a determination is made by one of the methods set forth in subdivision 6 that the facts do not preclude reimbursement. Under Section 301.095, the person seeking indemnification or advance had to promise to repay the amount received unless found to have met the criteria of that section.

This section expressly permits a corporation to limit or prohibit indemnification or advances, but instead of the permissive, case by case determination of eligibility permitted by the old provision, the limitation or prohibition must now apply equally to all persons requesting payment or to a class of these persons. Witnesses in actions who are not at that time parties to that action may receive payments for their expenses as witnesses at the option of the corporation. Section 301.095 was silent on this matter.

The manner of determining whether the criteria for eligibility have been met is largely the same as the method specified in Section 301.095 for the authorization of indemnification, except that this section adds a new step to the process; the board may refer the question of eligibility to a committee comprised of directors who are not parties to the proceeding before referring it to special legal counsel.

Insurance against liability from any act may be purchased by the corporation, at the option of the corporation, for any person connected with the corporation even though indemnification might not be permitted by this section in a

particular case. Section 301.095 restricted insurance coverage to those acts which could be indemnified under that law.

This section requires disclosure to shareholders of sums paid to indemnify any party in a derivative suit. The disclosure is to be made in the financial statement required by section 78. This disclosure is more limited than, but consistent with the disclosure required by Section 301.095.

GENERAL COMMENT:

The courts of this state have long recognized that the reimbursement of expenses incurred by corporate personnel in certain lawsuits is a sound public policy, as this passage from In re E. C. Warner Co., makes clear:

> Unless this is the rule, we have the further result that it is not likely that men of substance will be willing to assume the responsibility of corporate directors.
>
> "* * * Such a rule enables the director of limited means to enlist the professional service and aid of competent counsel who will be willing to undertake the defense upon the assurance that, if successful, payment would be forthcoming from the corporate treasury. The withholding of such assurance might well have the effect of denying the financially disabled director the opportunity of adequate representation in the suit against him. But what is more important than this is the fact that the right to reimbursement is a circumstance that would actuate and induce responsible business men to accept the post of directors, the emoluments of which would otherwise never be commensurate with the risk of loss involved in paying out of their own pocket the costs involved in defending their conduct. The right of reimbursement carries with it the added virtue that it is likely to discourage in large measure stockholders' litigation of the strike variety with which the courts are not unfamiliar. Solimine v. Hollander, 129 N.J.Eq. 272, 19 A.2d 348 (Italics supplied). This right of reimbursement has its foundation in the maintenance of a sound public policy favorable to the development of sound corporate management as a prerequisite for responsible corporate action."
>
> 252 Minn. 207, 214-15, 45 N.W. 2d 388, 393 (1950).

The court was speaking of judicial determinations of "innocence". The trend in recent years has been to move away from a judicial determination and towards a non-judicial internal determination of the nature of the conduct, MBCA Section 5. This section recognizes that trend and links it with the standard of conduct applicable to the person seeking indemnification.

In the past, indemnification was not a right which accompanied employment by a corporation, except "[t]o the extent that [the party] has been successful" in defending against the action, Minnesota Statutes, Section 301.095, Subdivision 3. This phrase does not indicate with any precision whether such indemnification is required only if the party is successful on all counts or on less than all counts, and if the latter is true, whether the amount paid in indemnification will be different depending upon the the number of charges, or the importance of charges, or whether some other method will be used. This raises the additional question of whether it is possible to assign relative importance to the separate causes of

action in a multiple suit.

The philosophy behind this section is one of reward. The section rewards and protects from financial injury those persons who have conducted themselves in an honest manner with respect to their dealings with the corporation. If those persons meet the standard set forth in this section, indemnification should be mandatory; the corporation should not be able to choose to indemnify some persons but not others. This certainty of protection is an added incentive to act in an honest and forthright manner. Similarly, the requirement that the person must meet specific, stringent criteria associated with the standard of conduct before indemnification will be permitted certainly forecloses a reward for bad conduct.

In each case, the person requesting indemnification must satisfy the following five criteria in order for eligibility for indemnification to be established:

1. No other organization may have paid the expenses for which indemnification is requested. This will prevent multiple payment of expenses. The policy of this section is to reimburse, not to overcompensate.

2. The person must have conducted himself in good faith. Only honest behavior is protected by indemnification.

3. No improper personal benefits or self-dealing in violation of section 42 are permitted.

4. If the action is a criminal prosecution, there must have been no reason for the person requesting indemnification to believe that the conduct was unlawful. Again, the presence of any suspicion of illegality is inconsistent with the behavior which the section is designed to induce and reward.

5. Finally, the person must have acted in a manner reasonably believed to have been in the best interests of the corporation, or acts or omissions by persons in their capacities for other organizations, not opposed to those best interests. This represents a significant strengthening of the former requirement which merely required conduct not opposed to the best interest of the corporation. The phrase present in section 41 referring to the ordinarily prudent person is not present here. That absence does not mean that negligent conduct is ignored in the determination whether or not eligibility for indemnification is awarded. This section imposes an affirmative burden on the person requesting payment: he or she must show that he or she acted in good faith and held a reasonable belief that the conduct was in or, in the instances noted, not opposed to the best interests of the corporation.

Subdivision 2(b) merely states that an unsuccessful defense of a proceeding does not automatically bar eligibility for indemnification. Instead, an independent determination of whether or not the criteria for eligibility have been satisfied is to be made as set forth in subdivision 6.

Under this section, the corporation must also make advance payment of expenses upon the request of a person who is eligible for indemnification, if that person supplies the corporation with an affidavit stating that the person honestly belives that he or she have met the criteria for mandatory indemnification and person promises to repay the corporation if it is ultimately found that the criteria were not met. Upon request for advance payment and submission of these documents, the corporation must make the advance payment unless it determines in one of the ways set forth in subdivision 6 that the facts known at the time of the request indicate that the criteria were not met by the conduct in question. This mandatory advance procedure insures that the person requesting advance will not be prevented from mounting a strong defense because of a lack of resources, but preserves the right of the corporation to be repaid if repayment

is warranted.

The corporation is not required to be generous in granting advances or indemnification if the board or shareholders set forth a policy of prohibiting or restricting indemnification or advance in the articles or bylaws as provided in subdivision 4. These limitations must apply equally to all persons eligible for indemnification (e.g., no more than $10,000 per person per suit), or all persons in a particular class, (e.g., all directors who are not employees are ineligible for indemnification). The ability to limit or prohibit indemnification may not be used to single out particular persons or prohibit indemnification after a request has been submitted. By making public the corporate policy on indemnification and advances, prospective officers, this section aids directors and employees in making an informed decision on whether or not to accept a position with a particular corporation.

Subdivision 5 permits but does not require the corporation to pay the expenses of directors, officers, employees or agents who are not parties to a proceeding but who are called as witnesses in the proceeding. The expenses caused by any such appearances where the witness appears by virtue of higher position with the corporation are expenses that the corporation should be permitted to pay, if for no other reason than to add to the inducements to retain top quality management. Payment of witness expenses is optional, never mandatory.

Subdivision 6 set forth the methods used to determine whether the criteria stated in subdivision 2 have been satisfied. There are five ways in which the determination may be made, but certain methods must be inapplicable or, in the case of the method stated in clause (e), must have been exhausted before certain other methods can be used.

The initial method of determination is direct board action. Directors who are parties in a proceeding arising from the same transaction may not vote on this question or be a part of the quorum for this purpose. As a result, this method cannot be used where most or all of the directors are named as parties to the proceeding, for example, in a derivative suit for corporate waste. In such cases, the board may use an alternative method of determination by appointing a committee consisting of two or more directors who are not parties to consider the matter. Those directors who are parties may vote to establish the committee. If all of the directors are parties to the proceeding, this method cannot be used unless the board can appoint two persons not parties to the board as directors by filling vacancies and then appoint those persons as the committee.

If the methods described in clauses (a) or (b) are not available, the board may refer the question either to special legal counsel.

If neither the board nor a committee makes a determination, the board must submit the question to special legal counsel selected with the approval of a majority of a disinterested quorum of the board, as described in (a), or if such a quorum cannot be obtained, by a committee of disinterested directors, as in (b), or if neither is possible, by an absolute majority of all of the directors.

Finally, if the question of eligibility cannot be determined by special legal counsel, the matter will be referred to the shareholders, in which case the holders of a majority of the shares present at a meeting at which a disinterested quorum of shareholders is present may approve the indemnification. Shares held by parties to the proceedings will not be counted in determining the presence of a quorum or in the actual vote.

If it is determined that the person is not eligible for indemnification or if no determination is made within 60 days of

a request for an advance or of the termination of a proceeding, whether or not the person has been successful in defense of the proceeding, that person may petition a court of competent jurisdiction for an independent determination of whether or not the criteria have been satisfied and eligibility for indemnification exists.

This system will help safeguard the corporation and the shareholders against unjustified indemnification. A shareholder if he or she believes that an indemnification was not justified, may take internal remedial action by removing the director or electing other persons as directors, or may pursue legal remedies by suing the directors for breach of the standard of conduct.

The shareholders are to be informed of all indemnifications payments in derivitive suits under subdivision 7. The reporting requirement is limited to derivative suits because amounts paid in third party suits are not truly indicative of any sort of fraud or misconduct on the part of the person indemnified, but may well be misconstrued as an indication of that by shareholders when in fact those payments may be fully justified in assuring the protection of the interests of the corporation.

Finally, the corporation is now permitted to insure any director, officer, employee or agent for any type of liability. The policy of this section is to promote and protect honest and faithful service to the corporation; although it is arguable that by permitting the purchase of insurance this policy may be avoided, the risk of undermining the policy of the section is much less than it may initially appear. First of all, though the section permits the corporation to insure its officers, it does not require them to purchase such insurance. The shareholders may restrict or prohibit the purchase of this insurance. Second, restrictions on insurance do not necessarily reduce expenditures; in the absence of insurance, the corporation will simply pay more to its employees, due to market forces and incentives created by corporations permitted under the laws of most other states, to purchase insurance, so that the employees may purchase this insurance. Third, it is quite likely that conduct in contravention of the standard of conduct will be excluded from the coverage of any typical insurance policy, thus these insurance policies offer little refuge to those who would "end-run" the policy of the section. It should be noted that the Securities and Exchange Commission has no objection to the use of insurance even in those cases where it requires waiver of indemnification for violations of the securities laws.

Finally, it should be noted that Section 1724(e)(3) of the Federal Securities Code, as approved by the American Law Institute, 2 Federal Securities Code 797 (ALI-ABA, Philadelphia, 1980) permits insurance for securities liabilities "without regard to (A) any state law to the contrary, or (B) the identity of the person who pays the premium." Moreover, the official comment to that section states:

> (7) Section 1724(e)(3): Since insurance companies presumably will not insure against liability for egregious conduct, and since any statutory limitation on the kind of conduct that is insurable would invite litigation with respect to the scope of the insurance coverage, the effect of this section is that there is simply no limitation as a matter of either federal or state law. At the same time, nothing here overrides any limitation on the authority to write specified kinds of insurance as a matter of state insurance regulation. That is to say, the provision does not apply unless the insurance is in fact written.
>
> 2 Federal Securities Code 800-801.

Civil liability for violations of federal securities law

constitute a major portion of those contingencies provided for by insurance purchased by corporations, thus a state law policy inconsistent with the Federal Securities Code might well impose an unfair and unequal burden on the officers or directors of non-reporting companies, and would give larger, publicly held corporations an unfair advantage in attracting and retaining top-quality management.

Section 85

SOURCE: MBCA Sections 45 and 152; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.22

CHANGE FROM FORMER LAW: This section represents a radical change in the philosophy of relying upon earnings and in calculating permissable distributions from former statutes of this state. Instead of requiring that dividends may be paid only out of certain kinds of "surplus" calculated by finding the excess of the value of the corporation and its assets over the aggregate par or stated value of the outstanding shares, this section requires only that the corporation will be able to pay its debts in the usual course of business after the distribution.

One of the effects of this change is the elimination of the "nimble dividend," (see Minnesota Statutes, Section 301.22, Subdivision 2(3)) because accounting periods are irrelevant under this section. Only the financial condition of the corporation at a given moment, measured as and at the time this section provides, will control whether or not the distribution is legal.

The restrictions on the method by which the financial condition is to be measured, see Minnesota Statutes, Section 301.22, Subdivision 1, are removed by this section. Instead, the determination may be based on any reasonable methods of accounting or valuation.

The emphasis on the earnings or surplus accumulated in prior or current fiscal years is also eliminated. Instead, this section provides that for the various types of distributions defined in section 1, subdivision 10, various times for various transactions will be used to measure the financial condition of the corporation: for share reacquisitions, the earlier of either the date on which the corporation transfers any consideration to the shareholder or the date the shareholder transfers the last of the shares to be reacquired; for other distributions, dividends, partial liquidations, and complete liquidations, either the date on which the board authorizes the payment or, in cases where payment is deferred more than 120 days after authorization, the date of payment.

If a corporation issues debt as part of a distribution, and if the person receiving the debt has transferred all shares to the corporation as part of the transaction, the ex-shareholder becomes an unsecured creditor subject only to pledges to third parties or other agreements between him or herself and the corporation unless the person received secured debt, of course.

The concept that payments to shareholders should be made only if enough value remains in the corporation to satisfy all preferences of senior securities has been retained. If that sum is not retained in the corporation, distribution payments will be made proportionately to the owner of the most senior class. If enough money remains in the accounts of the corporation after full payment to the senior class to satisfy the claims of that class, the next most senior class will receive the remainder, paid proportionately to the owners of that class. If the claims of that class are satisfied, the next most senior class will be treated in a like manner, and the funds authorized to be paid

will be distributed in that manner until exhausted.

GENERAL COMMENT:

This relatively drastic change in the law of distributions has been inspired by the experience of Massachusetts and California, and is similar to, but differs slightly from, the new Model Business Corporation Act (MBCA) provisions, particularly MBCA Section 45. Portions of the comment to that section are highly relevant and are reproduced here, modified slightly to conform to the proposed section.

The main purpose of this section is to bring the statute into conformity with the reality of the world of modern corporate finance. As the Model Act comment states:

> It has long been recognized by practitioners and legal scholars that the pervasive statutory structure in which "par value" and "stated capital" are basic to the state corporation statutes does not today serve the original purpose of protecting creditors and senior security holders from payments to junior security holders, and may, to the extent security holders are led to believe that it provides some protection, tend to be misleading. In light of this recognized fact, the Task Force has deleted the mandatory concepts of stated capital and par value.

This does not mean that par value, stated capital, and earned and paid-in surplus are now illegal. They are merely not required. Any corporation currently operating on the basis of these concepts may continue operating in that manner. Those corporations may also convert to this system of distributions without being required to abolish or change the par value or the stated value of any of its shares.

Instead of these outmoded concepts, the key to whether a distribution can or cannot be made, and how large the distribution may be, is whether or not the corporation will remain solvent as defined in this chapter after the distribution is made.

> In determining whether or not a corporation is, or as a result of a proposed distribution would be rendered, insolvent, the board of directors must exercise its collective business judgment as to whether making the distribution in question will render the corporation unable to pay its debts . . . in the ordinary course of its business operations. In making this determination, the directors are required and entitled to make certain judgments as to the future course of the corporation's business, including the likelihood that, based on existing and contemplated demand for the corporation's products or services, it will be able to generate funds over a period of time from its operations or from any contemplated orderly disposition of its assets sufficient to satisfy its existing and reasonably anticipated obligations. The directors are entitled to expect that substantial indebtedness which matures in the near-term will be refinanced where, on the basis of the corporation's financial condition and future prospects, and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. To the extent that the corporation may be subject to asserted or unasserted contingent liabilities, the directors are required and entitled to make judgments as to the likelihood, amount and time of any recovery against the corporation, after giving consideration to the extent to which the corporation is insured or otherwise protected by others against loss.

> What is appropriate for an on-going business enterprise is a cash flow analysis based on a business forecast and budget for a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over a period of time . . . rather than a simple measurement of current assets against current liabilities, or a determination that the present estimated "liquidation" value of the corporation's assets would produce sufficient funds to satisfy the corporation's existing liabilities. In exercising their judgment, the directors are entitled to rely on information, opinions, reports and statements prepared by others, as contemplated by section [45]. Judgments must of necessity be made on the basis of information in the hands of the directors when a distribution is authorized, and it is not expected that they will be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the corporation's business to repay long-term obligations which do not mature for several years, since the primary focus of the directors' decision to make a distribution should normally be on the corporation's prospects and obligations in the shorter term, unless special factors concerning the corporation's prospects require the taking of a longer-term prospective.
>
> The directors' decision as to whether to authorize a distribution is to be judged on the basis of the business judgment rule; that is, whether the directors acted in good faith and with a reasonable basis for believing that the distribution authorized was permitted by the statute, after due consideration of what they reasonably believed to be the relevant factors.
>
> The definition of "insolvent," namely, the inability of a corporation to pay its debts . . . in the usual course of its business, is consistent with the objectives of section [85] discussed above. On the other hand, the definition of "insolvency" in Section 2 of the Uniform Fraudulent Conveyance Act [Minnesota Statutes, Sections 513.20 to 513.32] is different, and may not be consistent with those objectives, since - if it is considered applicable to distributions and not superseded by the corporation statute - it appears to require the directors to determine whether the present liquidation value of the corporation's existing assets will be sufficient to satisfy the corporation's existing obligations as they mature.
>
> 34 Bus. Law. 1887 at 1881 to 1882

Therefore, subdivision 3(d) of this section renders that act inapplicable to corporate distributions. Instead, sections 87 and 88 clearly define shareholder and director liability for any payment which would render the corporation insolvent.

> In addition, if a corporation should become involved in proceedings under the federal bankruptcy laws following a distribution, the fraudulent conveyance provisions of section 67d (section 548 effective October 1, 1979) of the federal Bankruptcy Act could become applicable to the transaction. It should be recognized that while the Committee questions the desirability of inconsistency between this act, on the one hand, and the Uniform Fraudulent Conveyance Act and the Bankruptcy Act, on the other, the act deals fundamentally with the responsibility of directors, and failure to follow the standard of the act results in potential liability for directors under section [88]. In contrast, there is no provision in either

> the Uniform Fraudulent Conveyance Act or in the federal Bankruptcy Act for liability of directors; rather, the effect of those acts is to enable the trustee or other representative to recapture for the benefit of creditors funds distributed to others in some circumstances. Accordingly, considerations of public policy may justify the application of different standards in these two different sets of statutes.
>
> 34 Bus. Law at 1882

The phrase "able to pay debts in the ordinary course of business," is essentially self explanatory. If the corporation is paying its debts 90 days after billing, then it may use that period in determining whether it is able to pay its debts in the ordinary course of business even though the debts may be due and owing before that period expires.

In order to determine whether the corporation will be able to pay its debts in the ordinary course of business, the directors must make the decision with reference to some data. As the Model Act comment states:

> Incorporating technical accounting terminology and specific accounting concepts into new section 45 was rejected, principally because such terminology and concepts are constantly under review and subject to revision by the Financial Accounting Standards Board, the American Institute of Certified Public Accountants, the Securities and Exchange Commission and others. The Committee concluded that the Model Act should leave such determinations and resolutions of accounting matters to the judgment of the board of directors, taking into account its right to rely upon professional or expert competence and its obligation to be reasonably informed as to pertinent standards of importance that bear upon the subject at issue.
>
> Normally, a board of directors would use the corporation's separate "parent company" financial statements for such determinations of distributions. In the view of the Committee, a board of directors could properly use the equity method of accounting as set forth in APB No. 18 as to all of the corporation's investee corporations, including corporate joint ventures and subsidiaries, in the case of unconsolidated parent financial statements, although other evidence would be relevant in the total determination. Consolidated retained earnings (or "earned surplus") are usually the same as the parent company's retained earnings following equity method of accounting under current accounting standards.
>
> While the directors will normally be entitled to use generally accepted accounting principles and to give presumptive weight to the advice of professional accountants with respect thereto, it is important to recognize that the new section requires the use of accounting practices and principles that are reasonable in the circumstances, and does not constitute a statutory enactment of generally accepted accounting principles. In the view of the Committee, the widespread controversy concerning various accounting principles, and their constant reevaluation, requires a statutory standard of reasonableness, as a mtter of law, recognizing that there may be equally acceptable alternative solutions to specific issues as well as areas requiring judgment in interpreting such principles. This does not mean that the statute is intended to reject the use and reliance upon generally accepted accounting principles; on the contrary, it is expected that their use would be the basic rule in many cases. Of course,

small businesses using cash basis accounting could not use generally accepted accounting principles because those principles are geared to accrual-basis businesses. The statutory language does, however, require informed business judgment in the entire circumstances in applying particular accounting principles to the circumstances that exist at the time, for purposes of the ultimate legal measurement of the validity of distributions.

If a corporation's financial statements are not presented in accordance with generally accepted accounting principles, however, a board of directors should normally carefully consider the extent to which the assets may not be fairly stated or the liabilities may be understated, to determine the fairness of the aggregate amount of assets and the aggregate amount of liabilities.

34 Bus. Law at 1884

This section also gives specific authority for determinations on the basis of a fair valuation or other method that is reasonable in the circumstances. The statute accordingly authorizes departures from historical cost accounting and sanctions the utilization of appraisal methods for the purpose of determining the fund available for distributions. This is, of course, a departure from prior law which prohibited the inclusion of unrealized appreciation. In the view of the Committee, the prescription in the statute of a particular method or methods of valuation would be inadvisable, since different methods may have equal validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate to apply a "quick sale" liquidation value to an enterprise in most cases, particularly with respect to the payment of normal dividends. On the other hand, a quick sale valuation might be appropriate in certain circumstances, for example, for an enterprise in the course of liquidation or course of reducing its assets or business base to a material degree. In most cases, a fair valuation method on a going concern basis would likely be appropriate, if expectations are that the enterprise will continue as a viable going concern. In determining the value of assets, all of the assets of a corporation, whether or not reflected in the financial statements (e.g., a valuable executory contract), should be considered. Ordinarily a corporation should not selectively revalue assets. Likewise, all of a corporation's obligations and commitments should be considered and quantified to the extent appropriate and possible. In any event this section imposes upon the board of directors the responsibility of applying a method of determining the aggregate amounts of assets and liabilities that is reasonable in the circumstances.

Subdivision 2 also refers to another method that is reasonable in the circumstances. This phrase was inserted to comprehend the wide variety of possibilities that might not be deemed to fall under a "fair valuaton" but would be reasonable in the circumstances of a particular case.

Recognition is given under subdivision 4 to the preference rights of senior equity holders. The preference amount is the contractually stated maximum preference rights of senior equity holders in a liquidation (including if so provided in the articles, any arrearages in cumulative dividends) that would be payable at the time of the distributions.

TIME OF MEASUREMENT

The Committee recognized the need to specify the time at which the two tests imposed by section [85] should be measured. Accordingly, where shares of the corporation are acquired by it, a date approximating the earlier of the date of payment of any part of the consideration to the shareholder or the date the shareholder ceases to be a shareholder with respect to such shares is to be used as the measuring date. In all other cases, if payment occurs 120 days or less following the date of authorization, the date of authorization is to be used; if payment occurs more than 120 day following the date of authorization, then a date approximating the payment date is to be used.

REDEMPTION RELATED DEBT

In an acquisition of its shares, a corporation may pay out property or incur a debt to the former holder of the shares. The case law on the status of such debt has developed in a conflicting and confusing way, making it difficult to know what standards apply in drafting stock repurchase agreements, which are of special importance in closely-held corporate enterprises. Section [85] therefore makes two points clear where indebtedness of a corporaton is incurred or issued to a shareholder in a distribution.

First, such indebtedness is on a parity with the indebtedness of the corporation to its general unsecured creditors, except to the extent subordinated by pledge or agreement. General creditors are better off in such a situaton than they would have been if cash or other property had been paid out for the shares, and no worse off than if assets had been paid out to the shareholder, who had then promptly loaned the same to the corporation and thereby become a creditor.

Second, in applying each of the tests of section 85, the legality of the distribution must be measured at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid - though of course in some circumstances, such payment could constitute a preferential payment among creditors. In any later challenge arising out of the corporation's subsequent insolvency, if the test of section [85] was properly met at the time of the icurrence or issuance of the debt, the directors would be entitled to rely fully upon the good faith business judgment rule as discussed above.

34 Bus. Law, supra, at 1885-1886

Case law in Minnesota on distributions has been concerned more with the power of a court to compel the declaration of dividends when those dividends are withheld for unreasonable, unjust, or fraudulent purpose, Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809 (1939), Schmitt v. Eagle Roller Mill Co. 199 Minn. 382, 272 N.W. 277 (1937). This section is a permissive, not a mandatory, section, and the ordering of dividends is a matter best left to the discretion of our courts. The aforementioned cases are not overruled by this section; the reasonableness of the action withholding dividends should be carefully evaluated by the court.

There is one case which does deal with a matter covered by this section. The holding in Tracy v. Perkins-Tracy Printing Company, 278 Minn. 159, 153 N.W. 2d 241 (1967) (mortgage given by corporation to secure repurchase of all shares held by a shareholder held valid where, at time given, no impairment of surplus resulted from the repurchase) is expressly endorsed and

adopted by subdivision 3(a) and 3(c), which deal with the measurement date for the distribution and the rights of ex-shareholders. Under those subdivisions, the result reached in Tracy is reached by this section.

Section 86

SOURCE: MBCA Section 6; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.22, Subdivision 6

CHANGE FROM FORMER LAW: Minnesota Statutes Section 301.22 restricted repurchase or reacquisition of shares to those occasions when the available earned or paid-in surplus was sufficient to cover the cost of the reacquisition. This section permits acquisition at any time if that reacquision will not violate the provisions of section 85. The reacquired shares become authorized but unissued shares subject to sections 55 and 59, or, if the articles prohibit reissue of those shares, the reacquired shares lose their status as authorized but unissued shares, and the number of authorized shares is automaticaaly reduced by the number of reacquired shares, in which case the corporation must file a statement of the reduction with the secretary of state.

This section and section 85 must be read together. Consistent with the policy of flexibility in distributions, this provision permits reacquisition when the corporation will be solvent after the reacquisition.

The most notable aspect of this section is the elimination of the concept of treasury shares. Any reacquired shares reissued later are subject to preemptive rights under section 59; the terms of those shares must be fixed under section 55 regardless of the terms of the shares before reacquisition. This removes some of the possibilities for abuse inherent where a large number of treasury shares are at the disposal of the management.

The statement of cancellation of shares is required so that there will be a public record of the authorized number of shares, which is information required to be set forth and maintained in the articles of incorporation. When the statement is filed with the secretary of state it is treated as if it were an amendment of that provision of the articles.

Section 87

SOURCE: Cal. Corp. Code Section 506(c) (West); Md. Corp. and Ass'ns Code Ann. Section 2-316(a); Minnesota Statutes, Section 301.23(2), Paragraph 3; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.23(1)

CHANGE FROM FORMER LAW: Under Minnesota Statutes Section 301.23, the shareholder was liable to the corporation for the entire dividend or distribution received by that shareholder if any part of the dividend or distribution was made in violation of Section 301.22. Under this section, the shareholder is liable only for the excess of the amount received over the amount that could have been equally paid under section 85. Formerly, only the corporation could collect this amount. The new provision permits the corporation and, in the case of a dissolving corporation its receiver or officers, or any person entitled to contribution under sections 87 and 88, to collect

this amount. The action to recover the illegally distributed amount must be brought within two years of that distribution.

GENERAL COMMENT:

This section provides for the return of sums received by shareholders in distributions which violate section 85. It is not necessary that the shareholder know that the distribution was made illegally; rather the corporation has an absolute right to reclaim the difference between the amount received and the amount which could have been paid without violating section 85. For example, if a corporation has 10 equal shareholders, and if the corporation could distribute an aggregate of $1,500 and still be able to pay its debts in the ordinary course of business, and the shareholder actually receives $400, the shareholder is liable for the $250 difference between $400 and $150 (the shareholder's ratable share of the $1,500). In order to collect all of the money illegally distributed in this case, either all 10 shareholders would have to be named as parties or the corporation could proceed against directors under section 88.

Section 88

SOURCE: MBCA Section 48; Minnesota Statutes, Section 301.23(2), Paragraph 3 (modified); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.23

CHANGE FROM FORMER LAW: Both the new and old sections are fairly similar in effect, although the language has been simplified and the good faith exemption from liability has been linked more closely to the standard of conduct. There is one change; under this section, even a director who defrauded the corporation may obtain contributions from the other liable directors.

GENERAL COMMENT:

Directors who permit an illegal distribution must repay to the corporation the entire sum illegally distributed unless protected against liability by the standard of conduct of section 44. They may implead shareholders and other liable directors, and each director is liable only for the excess of the aggregate amount actually distributed over the aggregate amount legally available for distribution, director liability is joint and several. The directors may implead shareholders who received the illegal distribution. A court of competent jurisdiction may permit the impleader even after two years from the date of the distribution have expired, as long as the action against the corporation was commenced before the expiration of that period.

Section 89

SOURCE: MBCA Sections 71 and 72; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.36 and 301.41

CHANGE FROM FORMER LAW: This section generally authorizes the corporation to participate in the three basic types of fundamental corporate transaction permitted by this act. The old concept of consolidation has been eliminated, while a share exchange procedure has been introduced in this section.

GENERAL COMMENT:

The only important issue addressed in this section is the "business purpose" doctrine applicable to mergers recently developed in Delaware and arguably adopted in the unreported district court opinion in Bird v. Wirtz, 266 N.W. 2d 166 (Minn. 1978). This "business purpose" test requires every merger to have a valid "business purpose"; under that doctrine a merger without such a purpose which results in the "freeze-out" or elimination of minority interests may be set aside by the courts. The district court opinion in Bird v. Wirtz referred to Singer v. Magnavox, 380 A 2d 969 (Del. 1977). That case has given rise to the "business purpose" doctrine, which requires that mergers which effectively eliminate minority shareholders may be set aside unless they have as their purpose some valid "business purpose", Singer, supra at 975, 978. Along with this "business purpose" requirement, the Delaware court imposed a requirement of "entire fairness" of the transaction, id at 980.

What is or is not a valid business purpose has been the subject of further litigation in Delaware and elsewhere and the doctrine is still not clear. However, this doctrine has been widely publicized and the literature on the subject is voluminous. See, e.g., Brudney and Chirelstein, "A Restatement of Corporate Freezeouts," 87 Yale L.J. 1354 (1978). Another factor involved in the doctrine is "fairness."

The state of the law as to what is or is not a "valid business purpose," or whose purpose must be served, or as to what is "fair" is not clear at this time. This lack of clarity and certainty exposes many mergers to an unwarranted risk of being set aside and does not promote business transactions or economic growth. Therefore, this section eliminates this uncertainty from our law without significantly reducing the rights of shareholders to protect themselves against real abuses.

This section removes "business purpose" from the list of requirements for a valid merger. The "business purpose" doctrine is based on the theory that a merger without such a purpose is a self-serving transaction on the part of the controlling shareholders, and is therefore a breach of duty to the corporation or the shareholders. The Brudney-Chirelstein analysis of the problem divides these transactions into three different categories: the two-step or three-step takeover merger (a merger preceded by massive share acquisition); the merger of affiliated companies; and the going private phenomenon. They reached the conclusion that the "business purpose" factor is irrelevant, analyzing the three categories as follows:

1) The two-step or three-step merger is not a freeze-out, but is the natural extension of the tender offer which preceded the merger; no duty to the corporation or the shareholders exists to be breached.

2) The merger of affiliated companies has sufficient socially and economically redeeming qualities to justify its use as long as the minority shareholders receive the fair value of the shares so that they may participate in the continuing parent entity by purchasing an equivalent amount of securities of the parent; the key is fair value. This statute deals with this issue in section 80, which is exclusive.

3) Finally, Brudney and Chirelstein would prohibit the "going private" transaction as an inherent breach of duty to the corporation or the shareholders, but even here they find that "business purpose" is not the relevant test.

The Securities and Exchange Commission has also recognized that abuses are possible. Rules 13(e)(3) and 13(e)(4) promulgated under the Exchange Act of 1934, and recently adopted by the Commission seem to deal with this problem in a fairly specific way. Other state and federal securities laws may also offer some relief.

The remedy for lack of "entire fairness" in the transaction in this act is the appraisal section; by obtaining the fair value of the shares, the dissenting minority shareholder recoups the investment.

Section 90

SOURCE: MBCA Sections 71 and 72A

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.42

CHANGE FROM FORMER LAW: This section requires a "plan" rather than the "agreement" required by Minnesota Statutes, Section 301.42, Subdivision 1, but the "plan" must contain almost the exact terms required in the old provision. The only addition is the addition of the exchange procedure.

GENERAL COMMENT:

The "plan" described in this section is the basic element of the approval procedure. The plan may be supplemented by other documents which need not be presented to or approved by the shareholders. The plan is also the basic document filed with the office of the secretary of state in a merger.

Subdivision 1(c)(1) permits the use of any consideration, including money, in a merger. Of course, this flexibility is not available in a share exchange.

Subdivision 2 merely notes that the exchange procedure is not the only way to acquire the shares of a corporation. Any other lawful method may be utilized.

Section 91

SOURCE: MBCA Section 73

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.42, Subdivisions 1 and 2

CHANGE FROM FORMER LAW: Under this section, the "plan", or a short description of the plan, must be given to the shareholders as part of the meeting notice. This was not required under Minnesota Statutes, Section 301.42. The minimum majority required for approval of the plan in the absence of article or bylaw provisions is no longer two-thirds of the voting shares, but is instead a simple majority of the voting shares. Classes or series may vote as such if the plan affects one of the rights listed in section 15 or if the class or series is to be part of a share exchange. This section also eliminates the requirement that shareholders of the surviving or acquiring corporation approve the plan in certain cases where the interests of those shareholders will not be materially diluted as a result of the merger or exchange.

GENERAL COMMENT:

The minimum majority required for approval of these fundamental changes has been reduced throughout the statute from two-thirds of all voting shares to a majority of those shares. Of course a higher majority may be required pursuant to section 68. All shareholders whether or not holders of voting shares, must receive notice and a copy of the plan so that shareholders who wish to dissent may file notice of intent to dissent before the vote approving the transaction.

Subdivision 3 exempts certain transactions from shareholder

approval, because the voting and distribution rights and the investment contract of the shareholder are not materially altered by the transaction.

Section 92

SOURCE: MBCA Section 74

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.42, Subdivisons 3 and 4

CHANGE FROM FORMER LAW: Section 301.42 required that the agreement of merger be filed with the secretary of state. The new provision requires that the corporation file both the plan and a statement that the plan was either approved by, or did not require the approval of the shareholders.

GENERAL COMMENT:

By filing the signed statement that the plan was validly approved, or need not have been approved, by the shareholders the persons signing the articles of merger incur liability for any violation of section 91.

The plan is the basic record of the merger. The certificate issued by the secretary of state is merely a convenience to the corporation, and it has no legal effect under section 95.

Section 93

SOURCE: MBCA Section 75

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.421

CHANGE FROM FORMER LAW: The most significant change is the reduction of the percentage of outstanding shares owned by the parent required for this kind of merger from 100 percent to 90 percent. The issues of merger with foreign corporations and the effective date of a merger formerly covered by Section 301.421 are dealt with in sections 95 and 96.

GENERAL COMMENT:

Twenty-eight of the other fifty states' corporation laws permit these "short-form" mergers if at least 90 percent of the shares of the subsidiary are owned by the parent. Under this section the parent must own 90 percent of the shares of each class and series of the outstanding shares of the subsidiary.

No vote of the shareholders of either corporation is required for approval of the merger; indeed, only the directors of the parent must approve the merger by vote of a majority of a quorum. The minority shareholders of the subsidiary are too few to make a difference and approval by shareholders of the parent would usually not be required by section 91, subdivision 3. The directors of the subsidiary are usually directors, officers, or executives of the parent, whose votes will conform with the wishes of the parent's board. The resolution of merger must contain the basic terms of the merger.

The minority shareholders of the subsidiary are sent a copy of the plan so that they may dissent from the merger if they believe the compensation offered in the plan inadequate.

The articles of merger must be filed with the secretary of state no later than 30 days after the plan has been distributed

to the shareholders of the subsidiary.

Section 94

SOURCE: MBCA Section 73(c); New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota Statute or case deals with this subject

GENERAL COMMENT:

Under this section, a corporation may abandon a merger or exchange by following the procedures set forth in either subdivision 1 or subdivision 2. The only real difference between the procedures set forth in the two subdivisions is that by following the procedure set forth in subdivision 1, contract rights under the plan and any supplemental agreement are waived by mutual consent of the parties, while under the procedure set forth in subdivision 2, those rights remain a matter of possible liability due to the unilateral nature of the abandonment of the transaction under that subdivision.

Section 95

SOURCE: MBCA Section 76

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.42, Subdivision 4; 301.421; 301.43; and 301.45

CHANGE FROM FORMER LAW: The 31-day limit on deferred effectiveness of a merger which appeared in Section 301.42 has been eliminated. Under this section the merger is effective upon filing of the articles of merger with the secretary of state or at any future effective date stated in the articles of merger. An exchange is effective on the effective date which appears in the plan of exchange. The separate identity of the constituent corporations ceases and is merged into the surviving corporation. The provisions of Sections 301.42, subdivision 5, and 301.45, subdivisions 2 to 5 have been eliminated because they referred to the now-eliminated concepts of "surplus", "par value", and "stated capital". This section also states the effect of the transaction upon the shareholders.

GENERAL COMMENT:

The main purpose of this section are to insure the continuation of all corporate functions of the constituent corporations, to clarify the effect of the transaction on those corporations and the shareholders of those corporations, and to provide for the vesting of rights by operation of law without any need for further corporate action.

The main thrust of the section is directed towards the merger transaction because that is the only transaction contemplated by sections 89 to 97 in which one of the corporate entities actually disappears.

The effective date of a merger may be specified in the plan approved by the shareholders or the board, whereas the effective date of the exchange must appear in the plan in order for the exchange to be valid. If the plan of merger does not set forth an effective date, the plan will be effective at the time articles of merger that include the plan are filed with the secretary of state.

Subdivision 2 applies only to mergers. The effect, if any, of an exchange upon the corporations involved in the exchange is a matter to be negotiated between those corporations. This subdivision provides for combination of all of the rights of the disappearing corporations in a merger into the continuing entity, the surviving corporation; that corporation is not a new corporation but merely a continuation of a prior entity, even though the articles of the surviving corporation may be amended by the plan of merger.

Under subdivision 2(c), the surviving corporation, if it is a domestic corporation, has all of the rights and liabilities of a corporation incorporated under this chapter. This paragraph does not, and is not intended to, authorize mergers with corporations such as non-profit corporations or cooperatives which are otherwise prohibited from merging with business corporations. It merely delineates the law governing the entity. Mergers with foreign corporations are covered by section 96.

The transfer of rights of other corporations to the surviving corporation by operation of law is covered by subdivision 2(d). The subdivision also permits later confirmation of the transfer, or other methods of vesting the rights in the survivor, by the officers of the disappearing corporation. Since, certain rights may not be transferable, a careful inspection of the terms of licenses, permits, or other franchises should be undertaken.

Subdivision 2(e) covers the assumption by the survivor of the liabilities of the disappearing corporation. All of those liabilities, including pending or future causes of action arising from acts of the disappearing entities are the responsibility of the surviving corporation.

Subdivision 3 applies to both mergers and exchanges. The subdivision provides that, on the effective date, the shareholders become individually bound by the plan, that thereafter they are entitled only to the rights the plan provides for them, and that they are no longer shareholders in the constituent corporation after the effective date to the extent provided in the plan. The only continuing right those shareholders possess is the right to dissent pursuant to section 80.

Section 96

SOURCE: MBCA Section 77

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.41, Subdivision 2; and 301.421

CHANGE FROM FORMER LAW: This section differs little from the current requirements. The only change is that the requirements of Chapter 303 must be satisfied if the surviving corporation is a foreign corporation.

GENERAL COMMENT:

The effect of a merger with a foreign corporation is no different than the effect of a merger on two domestic corporations. The rights and liabilities pass to the survivor as described in section 95. The only special aspect of this type of merger is that a foreign surviving corporation must make itself available for service in this state (see subdivision 4).

Section 97

SOURCE: Minnesota Statutes, Section 301.36

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.36

CHANGE FROM FORMER LAW: Apart from changes in style to conform to the rest of the proposed chapter, the only change reflected in this section is the reduction of the majority required for approval of the sale or transfer from two-thirds of all voting shares to a majority of all voting shares.

GENERAL COMMENT:

The absence of references to written consent of the shareholders, class voting, or higher majorities does not mean that sections 15, 40, 41, 68, or 69 do not apply to this section (or others which do not specifically mention those items). Those sections apply to this and all other sections to which they are relevant, whether or not mentioned in the substantive section.

Subdivision 4 of this section is aimed at limiting the civil liabilities of transferors assumed by transferees to those agreed to between the parties or imposed by law, even if the transferee is operating the corporation in exactly the same manner as it was operated by the transferee. This limits, for example, exposure to product liability claims for items manufactured by the transferor. Of course, Federal statutes may preempt this statute in certain areas of liability.

Section 98

SOURCE: Mich. Corp. Laws Ann. Section 450.1801; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.46

CHANGE FROM FORMER LAW: A supervised voluntary dissolution is treated as involuntary for purposes of the procedures in dissolution. Under Section 301.46 et. seq., treatment of voluntary, court-supervised dissolutions was similar to treatment of voluntary, non-supervised dissolutions.

GENERAL COMMENT: This section is merely a general grant of authority to dissolve and refers to the provisions applicable to each of the three procedures in dissolution.

Section 99

SOURCE: MBCA Section 82

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota case or statute has previously dealt with this issue.

GENERAL COMMENT:

This section permits the incorporators listed in the articles of incorporation to dissolve the corporation in a simple, inexpensive way. Formerly, the incorporators had to issue shares and then the shareholders had to approve a dissolution under Section 301.47. In such cases, the corporation frequently became dormant, occupying space in the files of the office of the secretary of state and using what would otherwise be an available corporate name. This new procedure for use before shares are issued, will permit both practitioners and laymen to follow an easy procedure to dissolve a corporation.

Subdivision 1 generally authorizes the incorporators to dissolve the corporation. There are only two steps required for dissolution: the preparation of articles of dissolution signed by an absolute majority of the incorporators containing various statements that assure that no obligations of the corporation remain outstanding and the filing of those articles with the secretary of state. The dissolution is effective upon that filing. The secretary of state will issue a certificate of dissolution that has no legal effect on the actual time of dissolution and which is primarily for evidentiary purposes.

A dissolution in violation of this section, or a dissolution in which fraudulent statements appear in the articles of dissolution, will be ineffective to avoid liability against outstanding obligations.

Wrongful dissolution is a slightly different situation. There is no standard of conduct for incorporators in this chapter, although at common-law "promoters" were required to act in good faith, see, e.g., Venie v. Harriet State Bank of Minneapolis, 146 Minn. 142, 178 N.W. 170 (1920). There is no reason why incorporators should not be held to a standard similar to the standard of conduct for directors in those cases where the dissolution will result in actual economic loss to those incorporators who did not sign the dissolution.

Section 100

SOURCE: MBCA Section 84

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.47, Subdivision 1

CHANGE FROM FORMER LAW: The majority required to approve the dissolution has been reduced from two-thirds of the outstanding shares to a majority of the outstanding shares.

GENERAL COMMENT:

The reduction in the vote required for approval of dissolution is consistent with the general reduction in required majorities throughout this chapter for the purpose of maximizing corporate flexibility. The dissolution decision is entirely up to the shareholders; no approval by the board is required. The liability, if any, for a wrongful dissolution lies with those who voted for the dissolution. The standard used in such cases should be a standard of good faith.

Section 101

SOURCE: MBCA Sections 84 and 86(d); New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.47, Subdivisions 2, 3 and 4

CHANGE FROM FORMER LAW: The resolution approved by the shareholders need no longer be filed with the secretary of state. Instead, the corporation must file only a single notice of intent to dissolve. The dissolution process has been further simplified by the elimination of the trustee in voluntary dissolution. Under this section the officers and directors continue in office to wind up the corporation.

GENERAL COMMENT:

By retaining the usual corporate management system during voluntary dissolution instead of appointing a trustee,

dissolution can become a less costly procedure. The rights of shareholders, directors, officers and employees inter se also remain clear during the dissolution process; those rights are the same as they would be in a going concern. While the powers and liabilities of a dissolving corporation remain the same as those of a going concern, the corporation must take steps to wind up the business of the corporation as outlined in section 102.

Section 102

SOURCE: MBCA Section 87; Minnesota Statutes, Section 301.48, Subdivision 1 and 2

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.48

CHANGE FROM FORMER LAW: The officers or directors, not the trustee, wind up the corporation under this section. Otherwise there is no difference in the substance of the old and new provisions.

GENERAL COMMENT:

The board has the inherent power to sell or transfer the assets of the corporation in order to obtain funds to satisfy the liabilities of the corporation and to transfer the remaining value of the corporation to the shareholders. This power is not expressly stated here, but is implied and augmented by the exemption from section 97 granted by subdivision 2 of this section. The payment discussed in subdivision 3 is a distribution within the definition in section 1, subdivision 10 governed by sections 85 to 89.

Section 103

SOURCE: MBCA Section 87(a); Mich. Corp. Laws Ann. Section 450.1841; New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No prior Minnesota statute or case has dealt with this issue

GENERAL COMMENT:

This section and the following section comprise a system of notice to creditors inspired by that used in Article 6 of the Uniform Commercial Code and in Minnesota Statutes, Sections 524.3-801 and 524.3-803.

Notice is not required, but the giving of notice will speed the conclusion of the dissolution process. The notice, if given, must be sent or delivered to the address of every known claimant or creditor whose address is known to the corporation. If the corporation does not know the address of a claimant or creditor, it may give published notice that will suffice for purposes of this section. It may also give published notice to creditors or claimants who are not known to the corporation, and to the public. This published notice must be published weekly for four weeks in each of the counties where the registered office and the principal executive office of the corporation are located.

In any case, the notice given under subdivision 1 must contain information described in subdivision 2. This information is required so that creditors and claimants will know where, how, and when to make claims for debts or

obligations owed by the corporation.

Section 104

SOURCE: New

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute or case has addressed this issue

GENERAL COMMENT:

This section governs the treatment by the corporation of claims against the corporation made by creditors and claimants.

In order to file a claim, the creditor or claimant must proceed consistent with the procedure, if any, and the times, dates, and places set forth in the notice given pursuant to section 103. Failure to follow the procedures or other qualifications set forth in that notice results in the barring of the claim. It is important that the claim be filed with the corporation within the time provided in the notice so that the directors and officers of the corporation may process all claims in an orderly fashion and make subsequent distributions in dissolution to its shareholders, safe in the knowledge that all existing claims have been brought to their atttention and disposed of in a timely manner.

The corporation, in turn, must to act promptly on each claim. After receiving the claim, the corporation has thirty days to decide whether or not to pay the claim. If the corporation decides to reject the claim, it must send an express rejection to the creditor or claimant. A creditor or claimant who does not receive a response from the corporation within the allotted time may bring suit on the claim for judgment in the amount claimed. By requiring an affirmative response by the corporation, this section permits creditors and claimants to proceed on the assumption that their claims will be paid in the absence of such a response.

If the corporation rejects the claim, the creditor or claimant has several options: the creditor or claimant may acquiesce in the rejection; the creditor or claimant may fail to take any further action within 60 days of the rejection, or within 180 days from the date the notice of intent to dissolve was filed, whichever is later, and thus bar the enforcement of any existing claim; or the creditor or claimant may commence some sort of legal, arbitration or administrative proceeding within that time will avoid the barring of claims under section 117.

The corporation is not required to give notice to creditors and claimants; that part of section 103 is optional. However, when the corporation does not give notice, the creditor or claimant has two years from the filing of the notice of intent to dissolve to pursue the claim in a legal, arbitration or administrative proceeding before the claim will be barred. The longer period is permitted in this case because the failure by the corporation to pay the debt may not be discovered by the creditor until the preparation of the annual report; moreover, the creditor may not even be aware of the imminent dissolution of the debtor corporation. Even these claims must be settled; after two years have expired from the filing of notice to dissolve, the claim will be barred. A creditor who fails to investigate an unpaid debt for two years will not be permitted to make a claim at a later time, in the interests of certainty.

Section 105

SOURCE: New; MBCA Sections 88, 89 and 91

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No prior Minnesota statute or case addressed this issue. This section permits the reversal of voluntary dissolution proceedings. No prior Minnesota statute or case addressed this issue.

GENERAL COMMENT:

In certain cases, the reinstatement of the corporation as a going concern may be appropriate. The economic situation may take an upward turn, more accurate financial statements which may dissuade the shareholders from continuing the dissolution may become available, or the continuation of the corporate entity may become important. If any of these events occur, the shareholders may revoke the dissolution proceedings in the same manner they approved their commencement. After the revocation, the corporation must file a simple statement that the dissolution has been revoked; after filing this notice, the corporation is again a going concern.

Section 106

SOURCE: New; MBCA Sections 92 and 93

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.56

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.56 required the corporation to file a statement that the affairs of the corporation were wound up, but no details were required to be set forth in that statement. The new provision requires considerably more in the way of financial detail. This new statement may not be filed before the expiration of certain time periods or the satisfaction of certain conditions.

GENERAL COMMENT:

This section prevents the corporation from dissolving before all outstanding claims have been paid or statutorily barred, requires certain information to be publicly filed, and provides a distinct effective date for dissolution.

Subdivision 1 requires that the dissolving corporation satisfy one of the following three conditions before it is allowed to file articles of dissolution, and end all further liability as a corporate entity.

The corporation may file articles of dissolution if it has paid or made provision for payment of all debts known to the corporation. A liquidating trust, for example, a trust created for the purposes described in Treas. Reg. Sections 1.333-1(b)(1) or 1.337-1 will meet this requirement, although this section does not prohibit the use of other methods.

If the corporation does not pay all claims filed by creditors or claimants, it must wait for the expiration of one of the following two periods to file articles of dissolution: if the corporation gave notice to creditors under section 103, it must wait until the expiration of 180 days after the filing of the notice of intent to dissolve; if it gave no such notice, it must wait two years from that date.

The purpose of forcing the corporation to pay all its debts or wait until further claims are barred before permitting the corporation to file articles of dissolution is to insure that

distributions to shareholders will not be attacked at some later time under section 117; that attack could result in unexpected tax consequences adverse to the shareholder. By preventing premature payment, this section avoids those consequences.

Subdivision 2 requires the dissolving corporation to publicly file information on certain matters so that the secretary of state may ascertain whether the corporation has met the requirements of subdivision 1. Pending legal or other proceedings will not prevent dissolution if the corporation makes provisions for contingent payment of claims involved in those suits.

Subdivision 3 fixes that dissolution at the time the articles of disslution are filed with the secretary of state. A certificate of dissolution is issued, mostly as an evidentiary convenience, but the dissolution is effective upon filing, and all further claims are barred under section 117 upon filing.

The corporate entity does not continue for any purpose after dissolution, except as provided in sections 117 and 118. Service on the corporation, or upon the officers or directors of the corporation, the registered agent of the corporation, or upon the secretary of state on behalf of the corporation will be ineffective as service on the corporation, unless it is made in an action under sections 117 and 118. Thus, cases such as Mississippi Valley Development Corporation v. Colonial Enterprises, Inc., 300 Minn. 66, 217 N.W. 2d 760 (1974) Henderson v. Northwestern Heating Engineers, Inc., 274 Minn. 396, 144 N.W. 2d 46 (1966) Kopio's Inc. v. Bridgeman Creameries, 248 Minn. 348 79 N.W. 2d 921 (1956), which held service on a corporation after dissolution valid, are no longer relevant, relying as they did upon Minnesota Statutes, Section 300.59, which is no longer applicable to business corporations under this chapter, and which has no equivalent in the new chapter.

Section 107

SOURCE: MBCA Section 87(c)

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.46; 301.47, Subdivisions 5 and 6; 301.52; and 301.56

CHANGE FROM FORMER LAW: Supervised voluntary dissolution was formerly a procedure of mixed characteristics. Much of the procedure was similar to the old voluntary procedure and gave the trustee maximum freedom; other parts of it were under the strict control of the court. This section converts supervised voluntary dissolution into a procedure which is almost exactly the same as an involuntary dissolution. The only difference between involuntary and supervised voluntary dissolution is that supervised voluntary dissolution is commenced by act of the corporation, not by a third party who alleges certain conditions.

Section 301.47 left the choice of whether the dissolution should be a voluntary or supervised voluntary dissolution to the resolution authorizing dissolution, or to the trustees. This section permits the corporation to ask for supervision, and permits any shareholder or creditor to request a court to impose its supervision.

GENERAL COMMENT:

The chief purpose of this section is the protection of minority shareholders against fraud in the disposition of the assets of the dissolving corporation. Another useful aspect of supervised voluntary dissolution is the inherent protection from subsequent claims that is provided by court supervision.

Section 108

SOURCE: MBCA Section 97; N. J. Stat. Ann. 14A: 12-7(9), (10)

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.49, 301.50

CHANGE FROM FORMER LAW: A court may now order equitable relief as well as involuntary dissolution whenever the grounds for involuntary dissolution have been established. Those grounds have been altered by this section. The ground that the "object of the corporation" has failed has been eliminated. New grounds added include waste of corporate assets, failure to elect directors, and admission by the corporation of insolvency. The ground of deadlock has been amended to eliminate the requirement that the corporation cannot be operated for the benefit of the shareholders. Finally, the ground of fraud on minority shareholders has been reworded with the intent that protection will be available in appropriate circumstances. This section also includes provisions on the expenses for and venue of an action which permit the court to assess expenses as it may see fit and place venue in the county where the registered office of the corporation is located. Finally, the profitable financial condition of the corporation is not a bar to dissolution.

GENERAL COMMENT:

The remedy of involuntary dissolution is a drastic remedy. As such, "the court should grant the drastic remedy of dissolution with great caution and not in doubtful cases." In Re Lakeland Development Corporation, 277 Minn. 432, 442, 152 N.W. 2d 758, 765 (1967). The same court recognized that "dissolution proceedings, although now statutory, are fundamentally equitable in nature." supra at 441, 152 N.W. 2d at 764. In recognition of the truth of these observations, the power to order equitable relief which has less drastic effects than dissolution while protecting the interests of the shareholders petitioning for relief has been added by this section to the arsenal of relief available to the courts. This power is discussed in Thwing v. McDonald, 34 Minn. 148, 153, 154, 158 N.W. 820, 822 (1916) affirming those parts of a district court decisions requiring an accounting and mandating the payment of certain distributions to minority shareholders, with continuing jurisdiction in the district court to guard against abuses. The opinion in that case seems to require a court to investigate remedies short of dissolution where abuses have occurred before dissolution is considered. That policy is also the policy adopted by this section. In the past the courts may have been reluctant to order intermediate relief absent some sort of statutory authority. This section provides explicit statutory authority; that authority is meant to be used.

Dissolution or appropriate lesser relief is to be granted in any one of nine circumstances. First, in any supervised voluntary dissolution. The corporation and its shareholders have already decided to dissolve, and have merely requested the court to supervise the dissolution process so that it proceeds in an orderly manner.

Second, in a shareholder petition where it is established that the managing body of the corporation is deadlocked and that the shareholders cannot break that deadlock. "Deadlock" is not limited to those situations where there is an even split, although this will be the most common situation in which deadlock will occur.

Third, a shareholder action where it is established that the controlling persons acted fraudulently, illegally, or in a manner persistently unfair to a non-controlling shareholder. Although similar words appear in Minnesota Statutes, Section 301.49(3), the new provision should be interpreted in a more liberal manner. In view of the power of the court to order

lesser equitable relief, the threshold of "persistent unfairness" required for a lesser remedy should be proportionately less than the stringent standards which are required, quite properly, for the ultimate relief of dissolution. Abuse of non-controlling shareholders is not to be tolerated under this act; section 79 and this section stand as evidence of that policy.

Fourth, a shareholder action where it is established that directors have not been elected for the period during which two consecutive regular meetings should have been held.

Fifth, a shareholder petition where it is established that corporate assets are being wasted. This ground is especially ripe for lesser forms of relief.

Sixth, when the duration of the corporation has expired without extension. The dissolution process must be commenced, unless the duration of the corporation is extended after the dissolution procedure is started, in order for the corporation to come to an orderly end.

Seventh, in an action by a creditor where a judgment against the corporation has been returned unsatisfied. This particular ground may be used more as a method of inducing prompt payment rather than of actually dissolving the corporation. Dissolution may also be avoided here by the use of lesser relief.

Eighth, in a creditor action where the corporation admits that it is insolvent. The use of this proceeding must be considered in light of the Bankruptcy Act, 11 U.S.C. Sections 1 to 151316.

Ninth, when the attorney general establishes one of the grounds listed in section 111. (See the comment to that section for further explanation.)

One of the grounds listed in Section 301.49 provided that the corporation could be dissolved if it were deadlocked and if the corporation could not be operated for the benefit of its shareholders. The non-profitability requirement has been eliminated. Subdivision 2 of this section makes it clear that the profitable nature of a corporation is not a sufficient reason to deny dissolution, though it is clearly a factor to be considered and, in conjunction with other factors, may be a powerful argument for lesser relief.

In order to avoid "strike suits" similar to those which have developed under the derivative suit rules, subdivision 3 empowers the court to award expenses where a suit has been instituted in bad faith or has been conducted in a harassing manner by any party. A court proceeding in dissolution must be taken very seriously; the presence of this deterrent should help give it the respect it deserves.

Subdivision 4 provides that venue of the action shall be in the county of the registered office. This location will also be in the county where the principal place of business or the principal executive office is located for many corporations, a corporation may, however, have both its principal place of business and its executive office outside the state, but every corporation must have a registered office in this state.

Section 109

SOURCE: MBCA Section 98; Minnesota Statutes, Section 316.05

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.51, 301.52

CHANGE FROM FORMER LAW: This section provides that the court may exercise broad powers before a full hearing is held. Section 301.51 specifically provided only for the appointment of temporary receivers, this section provides much more detail. The inherent authority of the trustee is expanded by this section to include the disposition of the assets, but that disposition remains subject to court supervision. This section also includes a list of priorities in payment of debts as a guide to the receiver. No such priorities were listed in the prior law. This section also requires that assets remaining after payment of those debts be distributed to the shareholders. This concept is implied by, but not stated in, Chapter 301.

GENERAL COMMENT:

Subdivision 1 permits the court to order preliminary relief, after a preliminary hearing, in actions for involuntary dissolution or conversion of a voluntary dissolution into a supervised voluntary dissolution. This preliminary authority allows the court to protect petitioners against misuse of or damage to the corporate entity pending a full hearing on the matter and the appointment of a permanent receiver.

After the hearing, if dissolution is found to be the appropriate relief, the court may appoint a receiver to wind up the corporation. As an alternative, the court may issue a detailed order governing the dissolution and thus avoid appointing a receiver, of course, or may permit the corporate management to wind up the affairs of the corporation. If the court appoints a receiver, the receiver shall wind up the affairs of the corporation in any manner the court orders, but the receiver has the inherent power, unless limited by order of the court, to marshal the assets of the corporation.

In any case, the assets of the corporation are to be used to pay the debts of and the claims against the corporation, in the order of priorities set out in subdivision 3. The order appearing there is the same as the order provided in Minnesota Statutes, Section 316.05. There is one possible area of concern to the receiver: the application of 31 U.S.C. Section 191, which gives absolute priority to all debts owed to the United States government except claims for taxes which might be subordinated pursuant to the provisions of sections 6321 to 6325 of the Internal Revenue Code.

Section 110

SOURCE: MBCA Sections 98 and 99

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.52

CHANGE FROM FORMER LAW: Prior Minnesota law did not include any special qualifications for receivers. The power of a receiver to sue or defend in his or her own name is carried over from prior law. The assets of the corporation no longer vest in the receiver; instead, they remain assets of the corporation. The power to proceed with the liquidation of the assets of the corporation is discussed in section 109.

GENERAL COMMENT:

Under this section, a corporation may be appointed as the receiver for a corporation. This allows management corporations that have special expertise in winding up corporate affairs to be appointed as receivers if the court believes it less costly to have such a corporation in charge of the liquidation, than to have natural person as the receiver.

Section 111

SOURCE: MBCA Section 94; Minnesota Statutes, Section 301.57, Subdivision 2

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.57

CHANGE FROM FORMER LAW: While most of the grounds for involuntary dissolution by the attorney general have remained essentially the same under this section, the grounds stated in Section 301.57, subdivision 1, clauses (4) and (5) have been combined in subdivision 1(d) of this section. Subdivision 2 parellels present Section 301.57, Subdivision 2. The ground stated in subdivision 3 of Section 301.57 has been eliminated, because the procedure under this section is now the same as that under section 108.

GENERAL COMMENT:

GENERAL COMMENT:

This section provides the attorney general with the basic police power to prevent abuses of the corporate franchise. The five permitted grounds are all based on defective incorporation, violation of the laws governing corporations, or failure to use the corporate franchise, the three traditional bases of state action in this area. The fact that a certificate of incorporation has been issued is no defense against the first grounds stated in clauses (a) to (c) of subdivision 1, see section 20, nor is the state estopped from pursuing dissolution by having dealt with the corporate entity. The fourth ground, clause (d), subdivision 1, is similar to section 79 but requires flagrant or multiple violations. The fifth ground, clause (e), subdivision 2 is basically a house-cleaning provision for dormant corporations.

Subdivision 2 permits the corporation to correct the illegal condition and completely avoid dissolution proceedings. The attorney general must give the corporation 30-days notice in all cases before filing an action against the corporation under this section. If the action is based on an act or failure to act which can be corrected by the corporation, the attorney general must give 60-days notice (the normal 30-days and an additional 30-days) before filing the action. This period is long enough for corrections to be made by the corporation.

The procedure to be followed in dissolution by the attorney general is exactly the same as that followed in involuntary dissolution under sections 108 to 110 and 112 to 116.

Section 112

SOURCE: MBCA Section 100

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.54

CHANGE FROM FORMER LAW: Minnesota Statutes, Section 301.54 was very specific in the powers it gave the court. This section allows the court far more discretion to allow claims, to shape the form and frequency of any required notice to the fact situation, to bar claims, and to fix the last day for filing claims will be accepted.

GENERAL COMMENT:

The only limit upon the discretion of the court under this section is the requirement that the creditors and claimants must have at least 120 days to file their claims. The absence in this section of language dealing with issues specifically

mentioned in Minnesota Statutes, Section 301.54 is not intended to indicate that the court has no power in these areas. The court has complete discretion in those arras, including the setting or extending of the last date claims may be filed, as long as that date is at least 120 days after the date the order fixing the date is filed. The notice may be in any form the court deems sufficient to inform creditors of and claimants against the corporation of the impending dissolution. Claims not presented before the fixed date may be barred by the court; in addition, claims not filed before the entrance of the decree of dissolution may be barred under section 117. Counterclaims and contingent claims may be filed with the court; the court has full discretion to allow or to deny those claims. The court may also require the claims to be filed in any specific form.

Section 113

SOURCE: MBCA Section 101

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute or case has previously addressed this issue.

GENERAL COMMENT:

At some point in certain involuntary dissolution proceedings the parties may wish to petition the court for dismissal of the proceeding so that the business of the corporation may be resumed. This situation is most likely to occur soon after the institution of the dissolution proceeding, at a time when the assets of the corporation are still intact, although it may occur later in the proceedings. If the court determines that the grounds for dissolution relied upon no longer exist, the court shall dismiss the proceeding. The petition may be made by any complaining party or by the corporation. The court may also make the determination sua sponte. The corporation shall then resume operation of its business under the corporate management in office at the time dissolution proceedings were commenced, subject to any lesser relief ordered under section 108.

Section 114

SOURCE: MBCA Section 102

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.56

CHANGE FROM FORMER LAW: This section increases the detail in which the dissolution procedure is described, describes what must be done before the decree may be issued, and provides that the dissolution is effective when the court enters the decree, not when the decree is filed with the secretary of state.

GENERAL COMMENT:

The order of the court should be effective of its own force, and should not be dependent upon a ministerial act on the part of either the clerk of court or the office of the secretary of state. The filing of the decree, a matter in which time is of the essence, could be unintentionally delayed, especially in those cases where the court is located some distance from the office of the secretary of state. The time for barring most claims and liabilities is fixed at the entering of the order. The effect of the order is to terminate the existence of the corporation. This act contains no equivalent to Minnesota Statutes, Section 300.59, that section does not apply to a

corporation governed by this act. The corporate existence does not continue for the purpose of suing or being sued, or for any other purpose. Therefore, the discussion of the effect of dissolution under former law in Kopio's Inc. v. Bridgeman Creameries, 248 Minn. 348, 79 N.W. 2d 921 (1956) is no longer applicable, and service on the corporation cannot be made by any means because the corporation no longer exists. The discussion of who may be served after dissolution in Kopio's Inc. supra (secretary of state) and Henderson v. Northwestern Heating Engineers, Inc., 274 Minn. 396, 144 N.W. 2d 46 (1966) (trustee) are thus no longer applicable to voluntarily or involuntarily dissolved corporations.

Section 115

SOURCE: MBCA Section 103

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.56

CHANGE FROM FORMER LAW: This section provides that the clerk of court files the decree, and that no filing fee will be charged by the office of the secretary of state for that filing. The trustee need not sign the decree.

GENERAL COMMENT:

This section merely specifies the procedure for the filing of the decree.

Section 116

SOURCE: MBCA Section 104

FORMER MINNESOTA PROVISION: None

CHANGE FROM FORMER LAW: No Minnesota statute or case has addressed the issue.

GENERAL COMMENT:

A shareholder may not be readily available to accept his or her share of the proceeds. In order to prevent this circumstance from delaying the effectiveness of a voluntary or involuntary dissolution of the corporation, this section requires that the corporation pay the amount due to the state treasurer in trust for the missing shareholder. The corporation may pay that amount to some other person legally competent to accept that amount before resorting to payment to the state treasurer.

Section 117

SOURCE: N.J. Stat. Ann. Section 14A:12-13

FORMER MINNESOTA PROVISION: Minnesota Statutes, Sections 301.54, Subdivision 4; and 300.59

CHANGE FROM FORMER LAW: Under this section, all claims not pending at the time of dissolution are barred, with the two exceptions described in subdivisions 2 and 3. Section 300.59 permitted suits for three years following the dissolution of the corporation, although in involuntary dissolution claims not filed were barred by Section 301.54, Subdivision 4.

The two exceptions under this section permit the court to hear claims filed within one year after the effective date of the dissolution. Claims incurred during voluntary dissolution may be pursued at any time.

GENERAL COMMENT:

The goal of every dissolution, whether voluntary or involuntary, is to end the corporate existence as quickly and neatly as possible. The current practice of extending the corporate existence for three years after dissolution does not promote that goal. It is in the interests of all parties to the dissolution to provide some incentive for creditors and claimants to file their claims at the time that other claims are being processed under the procedures set forth in sections 104 and 112. Barring claims filed after dissolution serves to promote certainty and timely filing of claims.

The most important aspect of this section is that under it the corporation receives notice of all claims for which it may be liable. With this information in hand, the corporation has the opportunity to pay or provide for payment of all possible claims. Prompt payment will speed the dissolution process to a timely close.

Certain claims may be filed after the dissolution for good cause. Good cause does not include mere failure to file the claim; rather, it includes circumstances in which notice of the dissolution was not received by the person making the late claim, or where the claim did not arise until after the dissolution. The decision to permit the claim to be heard is in the discretion of the court. In any case, the claim may be heard only if the claimant files suit within one year of the effective date of the dissolution. This absolute time limit will promote certainty and protect shareholders from adverse tax consequences that may be created by later claims assessed against shareholders under subdivision 2(b).

If the claim is heard and allowed, subdivision 2(b) cushions the blow to any individual shareholder by limiting recovery to the undistributed assets, if any, that may have been reserved for the payment of similar claims, or, if those assets are insufficient (or nonexistent, having been totally distributed in payment of other claims), to the ratable share of the distribution each shareholder received in dissolution. That is, a shareholder who received 15% of the aggregate amount distributed to all shareholders as a distribution in dissolution would be liable for the lesser of the amount that shareholder received in dissolution or 15% of the amount allowed, if any, to the claimant.

Claims, debts, obligations or liabilities incurred by a corporation in a voluntary dissolution after the filing of the notice of intent to dissolve are not barred by this section. These claims may be pursued against the corporation or any former officer, director, or shareholder of the corporation for the normal statutory period, for the full amount of the claim. Claims against a corporation in involuntary dissolution are not included in the exemption because under involuntary dissolution, the claims should be paid by the receiver as part of the expenses of the dissolution under section 109, subdivision 3(a), which gives those expenses top priority in the order of payment. Failure to obtain payment in that manner under that section is the responsibility of the claimant, except where the corporation has no assets, in which case the court may provide whatever relief it believes is just and reasonable in the circumstances.

Section 118

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 300.59

CHANGE FROM FORMER LAW: Under prior law, the corporate existence was actually extended for three years for litigation purposes. This provision has no such effect. Instead, it permits an action to be prosecuted or defended by the officers, directors or shareholders.

GENERAL COMMENT:

It is important to understand that this section in no way continues the corporate existence. Therefore, after dissolution, the corporation does not exist, cannot be sued, and cannot be served, under either this chapter or Section 543.08. Moreover, no officer or agency relationship exists for service pursuant to Rule 4.03(c) of the Rules of Civil Procedure, and no other person is authorized by statute to receive service. Thus, any claim filed after the articles of dissolution have been filed with the secretary of state must be a claim against the officer, director, or shareholder as an individual, or must come within the narrow exceptions set forth in section 117, subdivisions 2 and 3, which impose liability on certain individuals. The officers, directors or shareholders may, but need not, continue the defense or prosecution of counterclaims in suits or other proceedings pending at the time of dissolution. If the officers, directors, or shareholders do not substitute themselves for the dissolved corporation, the claimant should be entitled to judgment for the full amount of his claim to be paid from the funds of the corporation provided for payment of suits under section 106, subdivision 2(d).

Under this provision, dissolution creates the certainty that no further claims will be made against the corporation, but protects the right of litigants to damages.

Section 119

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.56

CHANGE FROM FORMER LAW: Section 301.56 vested title to assets omitted from the distribution to the sharehollers in the trustee or receiver. The new provision permits the title to omitted assets to be transferred by the court to any person entitled to those assets.

GENERAL COMMENT:

Under the new dissolution procedures, title to corporate assets remains in the corporation in both voluntary and involuntary dissolution. After the dissolution, those with an equitable claim to undistributed property are either creditors and claimants of the corporation who were not paid in full or who filed after the dissolution became effective, or shareholders. Upon the discovery of these omitted assets, or upon the termination of pending claims resulting in the release of the assets, any person having a right to a part of those assets may petition the court for title to their share of the assets. The court may use any method it deems reasonable to assure the proper transfer of title, including, but not limited to the appointment of a trustee to divide and distribute the property.

Section 120

SOURCE: Md. Corp. & Assn's Code Ann. Sections 3-501 and 3-502; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.371, Subdivisions 1 and 2

CHANGE FROM FORMER LAW: This section contains no significant changes but requires that the amendment extending the corporate existence include certain information.

GENERAL COMMENT:

While corporations of limited duration are now relatively few in number, they still require a mechanism for extending their existence. The current method of extension by amendment of the articles is sufficient for the purposes of those corporations.

The corporate existence may be extended by a vote of a majority of the shareholders present, only voting shareholders must be given notice, and the extension is not an occasion for the exercise of dissenters rights. In these respects the extension amendment is treated as most other amendments to the articles are treated.

The section applies only to those corporations governed by this act. The extension is effective when filed with the secretary of state.

Section 121

SOURCE: Md. Corp. & Assn's Code Ann. Section 3-513; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.371, Subdivision 3

CHANGE FROM FORMER LAW: Subdivisions 4, 5 and 6 of Minnesota Statutes, Section 301.371 have been omitted as inappropriate. Subdivisions 1 and 2 are covered by section 2, subdivision 7, and sections 12 to 19 of this act, respectively. There is no change in this section from the policy of Section 301.371, subdivision 3.

GENERAL COMMENT:

This provision validates all acts taken during the period when existence lapsed by relating those actions to the date of expiration.

Section 122

SOURCE: New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 301.511

CHANGE FROM FORMER LAW: Unlike the active status report which was a one-time-only survey of Minnesota corporations, this section prescribes an annual survey of those corporations. The report required by this section requires fewer items of information than were required for the active status report. The penalties for failure to file the report have been increased; failure to file once will result in a loss of good standing, while failure to file in two consecutive years will result in a $25 fine and may lead to dissolution.

GENERAL COMMENT:

Many corporations are not dissolved at the end of their useful lives. Instead, they merely become dormant. The records of these corporations continue to clutter up the offices of various record-keeping agencies, most notably the office of the secretary of state. Each of these entities also uses an otherwise available corporate name. Finally, the secretary of state is ultimately responsible for accepting and forwarding service of process for these corporations. In order to facilitate the update of the registered office so that this service may be forwarded promptly, and in order to provide an incentive for these dormant corporations to use the simplified dissolution proceedings of this act in order to end the corporate existence, the statute requires the corporation to file an annual report. Minnesota is currently one of a very small number of states that do not require domestic corporations to file an annual report.

The report is to be made on a form printed and mailed to the corporation by the office of the secretary of state. It requires the corporation to provide a maximum of three pieces of information. The information is required for the prompt forwarding of service of process to the corporation. The report is to be returned, accompanied by the $10 filing fee required of any filing, to the secretary of state. If the report is incorrect in any way, or if it is not accompanied by the proper filing fee, the secretary of state shall return the report for correction. The corporation then has a 30-day period in which to correct and return the report.

If the form is not filed before July 1 of any calendar year, the corporation shall lose its good standing. The loss of good standing may prevent the corporation from conducting certain aspects of its business, dealing with banks, or qualifying as a foreign corporation in other states. For failure to file in two consecutive years, a $25 fine will be imposed. This fine may be imposed in each additional consecutive year in which the report is not filed, that is, if the corporation does not file for five years, it will lose its good standing and will be fined $100, i.e., $25 for each of years 2 (for the period of years 1 and 2), 3, (for 2 and 3), 4, and 5. This gives the participants in the dormant corporation an incentive dissolve. repeated violation of this provision leaves the corporation subject to dissolution under section 111, subdivision 1, clause (e).

Section 123

SOURCE: MBCA Section 14; New

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 543.08; Rules of Civil Procedure, Rule 4.03(c)

CHANGE FROM FORMER LAW: This section does not change existing laws. It is merely a supplement to them. Its appearance in the corporation act will bring the manner of service of process on a corporation to the attention of those who might not look elsewhere.

GENERAL COMMENT:

Service of process upon corporations is an important part of the relationship between the corporate entity and the state. This aspect of the relationship ought to be clearly set forth because corporations, unlike natural persons, have no fixed persona. That artificiality is one of the reasons why the act requires each corporation to have a registered office; the registered office is the one place where the state (and all other persons) can be sure to find the corporate entity.

The person serving the process has an initial choice of

method. He or she may serve the registered agent, wherever the agent may be found (the registered agent is expressly empowered by this statute to accept service under Rule 4.03(c), Rules of Civil Procedure) or may serve an officer of the corporation anywhere in this state, under Minnesota Statutes, Section 543.08. Or, the server can serve the secretary of state in certain circumstances.

In order to serve the secretary of state, the server must be unable to find either the registered agent or any other officer at the registered office. The server need look no further; at that point he may serve at least two copies of the process on the secretary of state, who will retain one copy and forward one copy to the registered office. A filing fee of $10, as provided in section 1, subdivision 10 must also be paid. Any process served upon the secretary of state is returnable within 30 days (not 20 days as prescribed in the Rules of Civil Procedure). The corporation is given an extra 10 days in which to reply in order to allow a margin of error for any delay in service which may occur in the course of transmitting the process from the office of the secretary of state to the registered office of the corporation.

No additional steps need be taken under this section, unlike the additional steps suggested in Berkman v. Weckerling 247 Minn. 277, 285, 77 N.W. 2d 291, 296 (1956). The "registered agent" maa be served, but no mention of "managing agent" is made in this section. This latter term formerly contained in Section 543.08, was the cause of some litigation, see e.g., Dillon v. Gunderson, 235 Minn. 208, 50 N.W. 2d 275 (1951) but has since been changed to "officer" in Section 543.08.

Section 124

SOURCE: Minnesota Statutes, Section 316.10

FORMER MINNESOTA PROVISION: Minnesota Statutes, Section 316.10

CHANGE FROM FORMER LAW: None

GENERAL COMMENT:

This provision merely provides that the court notify the attorney general of the commencement of certain proceedings. The attorney general may, but need not, intervene in those a proceeding.

Section 135

SOURCE: New

GENERAL COMMENT:

The reason sections 125, 133 and 134 are effective later than the remainder of the bill is that they are associated with the repeal of Sections 301.01 to 301.67. That repeal cannot become effective until the mandatory effective date, if an orderly transition is to occur.

APPENDICES

MINNESOTA BUSINESS CORPORATION ACT OF 1981

CONTENTS

DISPOSITION OF SECTIONS

The following table lists all sections currently applicable to domestic business corporations which will not apply to corporations incorporated or coming under the new act, and the equivalent section or sections, if any, in the proposed act.

Section in Minnesota Statutes, 1980	Equivalent Section in Proposed Act
300.01	
300.02	1
300.026	
300.03	5
300.06	1, subdivision 11; 18
300.07	
300.081	21, subdivisions 13, 15
300.36	55
300.49	1, subdivision 11
300.51	20
300.59	
300.61	
300.63	
300.66	21, subdivision 11
300.67	21, subdivision 11
300.68	21, subdivision 11
301.01	125
301.02	1
301.03	5; 6
301.04	7; 55; 58
301.05	8; 9
301.06	18; 19
301.07	18; 19
301.071	18; 19
301.08	20
301.09	21; 22
301.095	84
301.10	21
301.11	20

1	301.12	23
2	301.13	20
3	301.14	55; 63
4	301.15	57
5	301.16	57
6	301.17	56
7	301.18	59
8	301.19	62
9	301.20	
10	301.21	
11	301.22	85; 86
12	301.23	87; 88
13	301.24	25
14	301.25	65; 66; 67; 70
15	301.26	33; 69; 71; 72; 73
16	301.27	74
17	301.28	26 to 31; 36 to 42
18	301.29	35
19	301.30	46 to 49; 52
20	301.31	44; 54
21	301.32	82
22	301.33	10; 11
23	301.34	77
24	301.35	78
25	301.36	97
26	301.37	12 to 19
27	301.371	120; 121
28	301.38	12 to 17
29	301.39	
30	301.40	80; 81
31	301.41	89 to 92; 96
32	301.42	89 to 92; 96
33	301.421	93
34	301.43	95
35	301.44	80; 81
36	301.45	95
37	301.46	98
38	301.47	100; 101; 105
39	301.48	102; 104; 106
40	301.49	108
41	301.50	108
42	301.51	102
43	301.511	122
44	301.52	102; 110
45	301.53	106
46	301.54	109; 112; 113
47	301.55	
48	301.56	114
49	301.57	111
50	301.58	
51	301.59	4
52	301.60	2; 3
53	301.61	2
54	301.62	2
55	301.63	2
56	301.64	
57	301.65	
58	301.66	
59	301.67	
60	316.01	
61	316.02	
62	316.03	79
63	316.04	79
64	316.05	108; 109
65	316.06	
66	316.10	124
67	316.12	
68	316.13	

Lessard

[REVISOR] PMM/CS 81-0284

120

JAN 26 1981

Messrs. Petty, Tennessen, Sieloff, Hanson and Dahl introduced--

S. F. No. 120 Referred to the Committee on Judiciary

A bill for an act

relating to corporations; modernizing and improving provisions governing business corporations; appropriating money; amending Minnesota Statutes 1980, Sections 53.01; 303.05, Subdivision 1; 308.341; 319A.03; 319A.05; 319A.12, Subdivisions 1a and 2; 319A.20; and 367.42, Subdivision 1; proposing new law coded in Minnesota Statutes, Chapter 302A; repealing Minnesota Statutes 1980, Sections 301.01 to 301.67.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [302A.011] [DEFINITIONS.]

Subdivision 1. [SCOPE.] For the purposes of sections 1 to 125, unless the language or context clearly indicates that a different meaning is intended, the words, terms, and phrases defined in this section have the meanings given them.

Subd. 2. [ACQUIRING CORPORATION.] "Acquiring corporation" means the domestic or foreign corporation that acquires the shares of a corporation in an exchange.

Subd. 3. [ADDRESS.] "Address" means mailing address. In the case of a registered office or principal executive office, the term means the office address, which shall not be a post office box.

Subd. 4. [ARTICLES.] "Articles" means, in the case of a corporation incorporated under or governed by sections 1 to 125, articles of incorporation, articles of amendment, a resolution of election to become governed by sections 1 to 125, a statement of change of registered office or registered agent, a statement

record the document in the office of the secretary of state, and return the document to the person who delivered it for filing.

Subd. 12. [FOREIGN CORPORATION.] "Foreign corporation" means a corporation organized for profit that is incorporated under laws other than the laws of this state for a purpose or purposes for which a corporation may be incorporated under sections 1 to 125.

Subd. 13. [GOOD FAITH.] "Good faith" means honesty in fact in the conduct of the act or transaction concerned.

Subd. 14. [INTENTIONALLY.] "Intentionally" means that the person referred to either has a purpose to do or fail to do the act or cause the result specified or believes that the act or failure to act, if successful, will cause that result. A person "intentionally" violates a statute if the person intentionally does the act or causes the result prohibited by the statute, or if the person intentionally fails to do the act or cause the result required by the statute, even though the person may not know of the existence or constitutionality of the statute or the scope or meaning of the terms used in the statute.

Subd. 15. [KNOW; KNOWLEDGE.] A person "knows" or has "knowledge" of a fact when the person has actual knowledge of it. A person does not "know" or have "knowledge" of a fact merely because the person has reason to know of the fact.

Subd. 16. [LEGAL REPRESENTATIVE.] "Legal representative" means a person empowered to act for another person, including, but not limited to, an agent, officer, partner, or associate of, an organization; a trustee of a trust; a personal representative; an executor of a will; an administrator of an estate; a trustee in bankruptcy; and a receiver, guardian, custodian, or conservator of the person or estate of a person.

Subd. 17. [NOTICE.] "Notice" is given to a person when mailed to the person at an address designated by the person or at the last known address of the person, or when communicated to the person orally, or when handed to the person, or when left at the office of the person with a clerk or other person in charge of the office, or if there is no one in charge, when left in a conspicuous place in the office, or if the office is closed or

establishing or fixing the rights and preferences of a class or series of shares, a statement of cancellation of authorized shares, articles of merger, articles of abandonment, and articles of dissolution. In the case of a foreign corporation, the term includes all documents serving a similar function required to be filed with the secretary of state or other officer of the corporation's state of incorporation.

Subd. 5. [BOARD.] "Board" means the board of directors of a corporation.

Subd. 6. [CLASS.] "Class", when used with reference to shares, means a category of shares that differs in designation or one or more rights or preferences from another category of shares of the corporation.

Subd. 7. [CONSTITUENT CORPORATION.] "Constituent corporation" means a domestic or foreign corporation that is a party to a merger or exchange.

Subd. 8. [CORPORATION.] "Corporation" means a corporation, other than a foreign corporation, organized for profit and incorporated under or governed by sections 1 to 125.

Subd. 9. [DIRECTOR.] "Director" means a member of the board.

Subd. 10. [DISTRIBUTION.] "Distribution" means a direct or indirect transfer of money or other property, other than its own shares, with or without consideration, or an incurrence of indebtedness, by a corporation to or for the benefit of any of its shareholders in respect of its shares. A distribution may be in the form of a dividend or a distribution in liquidation, or as consideration for the purchase, redemption, or other acquisition of its shares, or otherwise.

Subd. 11. [FILED WITH THE SECRETARY OF STATE.] "Filed with the secretary of state" means that an original of a document meeting the applicable requirements of sections 1 to 125, signed, acknowledged in the manner provided in Minnesota Statutes, Sections 358.32 to 358.40, and accompanied by a filing fee of $10, has been delivered to the secretary of state of this state. The secretary of state shall endorse on the original the word "Filed" and the month, day, year, and time of filing,

the person to be notified has no office, when left at the dwelling house or usual place of abode of the person with some person of suitable age and discretion then residing therein. Notice is given to a corporation when mailed or delivered to it at its registered office. Notice by mail is given when deposited in the United States mail with sufficient postage affixed.

Subd. 18. [OFFICER.] "Officer" means a person elected, appointed, or otherwise designated as an officer by the board, and any other person deemed elected as an officer pursuant to section 50.

Subd. 19. [ORGANIZATION.] "Organization" means a domestic or foreign corporation, partnership, limited partnership, joint venture, association, business trust, estate, trust, enterprise, and any other legal or commercial entity.

Subd. 20. [OUTSTANDING SHARES.] "Outstanding shares" means all shares duly issued and not reacquired by a corporation.

Subd. 21. [PARENT.] "Parent" of a corporation means a corporation that directly, or indirectly through related corporations, owns more than 50 percent of the voting shares of the corporation.

Subd. 22. [PERSON.] "Person" includes a natural person and an organization.

Subd. 23. [PRINCIPAL EXECUTIVE OFFICE.] "Principal executive office" means an office where the elected or appointed chief executive officer of a corporation has an office. If the corporation has no elected or appointed chief executive officer, "principal executive office" means the registered office of the corporation.

Subd. 24. [REGISTERED OFFICE.] "Registered office" means the place in this state designated in the articles of a corporation as the registered office of the corporation.

Subd. 25. [RELATED CORPORATION.] "Related corporation" means a parent or subsidiary of a corporation or another subsidiary of a parent of the corporation.

Subd. 26. [SECURITY.] "Security" has the meaning given it in Minnesota Statutes, Section 80A.14, Paragraph (q).

Subd. 27. [SERIES.] "Series" means a category of shares, within a class of shares authorized or issued by a corporation by or pursuant to its articles, that have some of the same rights and preferences as other shares within the same class, but that differ in designation or one or more rights and preferences from another category of shares within that class.

Subd. 28. [SHARE.] "Share" means one of the units, however designated, into which the shareholders' proprietary interests in a corporation are divided.

Subd. 29. [SHAREHOLDER.] "Shareholder" means a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of one or more shares of the corporation.

Subd. 30. [SIGNED.] (a) "Signed" means that the signature of a person has been written on a document, as provided in Minnesota Statutes, Section 645.44, Subdivision 14, and, with respect to a document required by sections 1 to 125 to be filed with the secretary of state, means that the document has been signed by a person authorized to do so by sections 1 to 125, the articles or bylaws, or a resolution approved by the affirmative vote of a majority of the directors or the holders of a majority of the voting shares present.

(b) A signature on a document not required by sections 1 to 125 to be filed with the secretary of state may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, or in any other manner reproduced on the document.

Subd. 31. [SUBSIDIARY.] "Subsidiary" of a specified corporation means a corporation having more than 50 percent of its voting shares owned directly, or indirectly through related corporations, by the specified corporation.

Subd. 32. [SURVIVING CORPORATION.] "Surviving corporation" means the domestic or foreign corporation resulting from a merger.

Subd. 33. [TRANSACTION STATEMENT.] "Transaction statement" means an "initial transaction statement" as defined in Minnesota Statutes, Section 336.8-408(4).

Subd. 34. [VOTE.] "Vote" includes authorization by written

action.

Subd. 35. [VOTING SHARES.] "Voting shares" means outstanding shares entitled to vote.

Subd. 36. [WRITTEN ACTION.] "Written action" means a written document signed by all of the persons required to take the action described. The term also means the counterparts of a written document signed by any of the persons taking the action described. Each counterpart constitutes the action of the persons signing it, and all the counterparts, taken together, constitute one written action by all of the persons signing them.

APPLICATION

Sec. 2. [302A.021] [APPLICATION AND ELECTION.]

Subdivision 1. [ELECTION BY CHAPTER 300 CORPORATIONS.] A corporation incorporated under Minnesota Statutes, Chapter 300 for a purpose or purposes for which a corporation may be incorporated under sections 1 to 125 may elect to become governed by sections 1 to 125.

Subd. 2. [ELECTION BY BUSINESS AND PROFESSIONAL CORPORATIONS.] A corporation incorporated under Minnesota Statutes, Sections 301.01 to 301.67 may elect, on or after July 1, 1981 and before January 1, 1983, to become governed by sections 1 to 125. A corporation incorporated under Minnesota Statutes, Sections 301.01 to 301.67 and 319A.01 to 319A.22 may elect, on or after July 1, 1981 and before January 1, 1983, to become governed by sections 1 to 125 and Minnesota Statutes, Sections 319A.01 to 319A.22.

Subd. 3. [CONFORMING ARTICLES OF ELECTING CORPORATIONS.] If the articles of an electing corporation include a provision prohibited by sections 1 to 125 or omit a provision required by sections 1 to 125 or are otherwise inconsistent with sections 1 to 125, the electing corporation shall amend its articles to conform to the requirements of sections 1 to 125. The appropriate provisions of the corporation's articles or bylaws or the law by which it was governed before the effective date of the election made pursuant to this section control the manner of adoption of the amendment.

Subd. 4. [METHOD OF ELECTION.] An election to become

governed by sections 1 to 125 shall be made by resolution approved by the affirmative vote of the holders of a majority, or a larger proportion or number required by the articles, of the shares represented and voting at a duly held meeting of the corporation. The resolution, and articles of amendment if required, shall be filed with the secretary of state and is effective upon filing.

Subd. 5. [EFFECT OF ELECTION UPON BYLAWS.] Upon filing an election pursuant to subdivision 4, all provisions of the bylaws that are consistent with sections 1 to 125 remain or become effective and all provisions of the bylaws that are inconsistent with sections 1 to 125 cease to be effective.

Subd. 6. [CHOICE OF INCORPORATION UNTIL JANUARY 1, 1983.] From July 1, 1981 to December 31, 1982, inclusive, a corporation incorporated for a purpose or purposes for which a corporation may be incorporated under sections 1 to 125 may be incorporated either under sections 1 to 125 or under Minnesota Statutes, Sections 301.01 to 301.67, or, if applicable, Minnesota Statutes, Sections 301.01 to 301.67 and 319A.01 to 319A.22.

Subd. 7. [NON-ELECTING BUSINESS CORPORATIONS SUBJECT TO LAW AS OF JANUARY 1, 1983.] A corporation in existence on January 1, 1983 and incorporated for a purpose or purposes for which a corporation may be incorporated under sections 1 to 125 or, if applicable, sections 1 to 125 and Minnesota Statutes, Chapter 319A, other than a corporation incorporated under Minnesota Statutes, Chapter 300, that has not elected before January 1, 1983 to become subject to sections 1 to 125, becomes governed by sections 1 to 125 or, if applicable, sections 1 to 125 and Minnesota Statutes, Chapter 319A, on January 1, 1983 as fully as though the corporation had been incorporated under sections 1 to 125 or, if applicable, sections 1 to 125 and Minnesota Statutes, Chapter 319A. All provisions of the articles and bylaws of the corporation that may be included in the articles or bylaws under sections 1 to 125 remain in effect. All provisions of the articles and bylaws of the corporation that are inconsistent with sections 1 to 125 cease to be effective on January 1, 1983. Any provisions required by

sections 1 to 125 to be contained in the articles that do not appear in the articles are read into them as a matter of law.

Subd. 8. [INCORPORATION AFTER JANUARY 1, 1983.] Effective January 1, 1983, a corporation incorporated for a purpose or purposes for which a corporation may be incorporated under sections 1 to 125 shall be incorporated only under sections 1 to 125.

Subd. 9. [LAWS NOT TO APPLY.] Minnesota Statutes, Sections 222.19, 222.23, 300.01, 300.02, 300.06 to 300.09, 300.12 to 300.68, and Chapters 301 and 316 do not apply to a corporation incorporated under or governed by sections 1 to 125.

Sec. 3. [302A.031] [TRANSITION.]

The continuation or completion of any act by a corporation that has not incorporated under, but has become governed by, sections 1 to 125, and the continuation or performance of any executed or wholly or partially executory contract, conveyance, or transfer to or by the corporation, shall, if otherwise lawful before the corporation became governed by sections 1 to 125, remain valid, and may be continued, completed, consummated, enforced, or terminated as required or permitted by a statute applicable prior to the date on which the corporation became governed by sections 1 to 125.

Sec. 4. [302A.041] [RESERVATION OF RIGHT.]

The state reserves the right to amend or repeal the provisions of sections 1 to 125. A corporation incorporated under or governed by sections 1 to 125 is subject to this reserved right.

INCORPORATION; ARTICLES

Sec. 5. [302A.101] [PURPOSES.]

A corporation may be incorporated under sections 1 to 125 for any business purpose or purposes, unless some other statute of this state requires incorporation for any of those purposes under a different law. Unless otherwise provided in its articles, a corporation has general business purposes.

Sec. 6. [302A.105] [INCORPORATORS.]

One or more natural persons of full age may act as incorporators of a corporation by filing with the secretary of

state articles of incorporation for the corporation.

Sec. 7. [302A.111] [ARTICLES.]

Subdivision 1. [REQUIRED PROVISIONS.] The articles of incorporation shall contain:

(a) The name of the corporation;

(b) The address of the registered office of the corporation and the name of its registered agent, if any, at that address;

(c) The aggregate number of shares that the corporation has authority to issue; and

(d) The name and address of each incorporator.

Subd. 2. [STATUTORY PROVISIONS THAT MAY BE MODIFIED ONLY IN ARTICLES.] The following provisions govern a corporation unless modified in the articles:

(a) A corporation has general business purposes (section 5);

(b) A corporation has perpetual existence and certain powers (section 21);

(c) The power to adopt, amend, or repeal the bylaws is vested in the board (section 25);

(d) A corporation must allow cumulative voting for directors (section 33);

(e) The affirmative vote of a majority of directors present is required for an action of the board (section 40);

(f) A written action by the board taken without a meeting must be signed by all directors (section 41);

(g) The board may authorize the issuance of securities and rights to purchase securities (section 55, subdivision 1);

(h) All shares are common voting shares of one class and one series (section 55, subdivision 2, clauses (a) and (b));

(i) All shares have equal rights and preferences in all matters not otherwise provided for by the board (section 55, subdivision 2, clause (b));

(j) The par value of shares is fixed at one cent per share for certain purposes and may be fixed by the board for certain other purposes (section 55, subdivision 2, clause (c));

(k) The board or the shareholders may issue shares for any consideration or for no consideration to effectuate share dividends or splits, and determine the value of nonmonetary

consideration (section 57, subdivision 1);

(l) Shares of a class or series must not be issued to holders of shares of another class or series to effectuate share dividends or splits, unless authorized by a majority of the voting shares of the same class or series as the shares to be issued (section 57, subdivision 1);

(m) A corporation may issue rights to purchase securities whose terms, provisions, and conditions are fixed by the board (section 58);

(n) A shareholder has certain preemptive rights, unless otherwise provided by the board (section 59);

(o) The affirmative vote of the holders of a majority of the voting shares represented and voting at a duly held meeting is required for an action of the shareholders, except where section 1 to 125 requires the affirmative vote of a majority of all voting shares (section 66, subdivision 1); and

(p) Shares of a corporation acquired by the corporation may be reissued (section 86, subdivision 1).

Subd. 3. [STATUTORY PROVISIONS THAT MAY BE MODIFIED EITHER IN ARTICLES OR IN BYLAWS.] The following provisions govern a corporation unless modified either in the articles or in the bylaws:

(a) Directors serve for an indefinite term that expires at the next regular meeting of shareholders (section 29);

(b) The compensation of directors is fixed by the board (section 31);

(c) A certain method must be used for removal of directors (section 35);

(d) A certain method must be used for filling board vacancies (section 36);

(e) If the board fails to select a place for a board meeting, it must be held at the principal executive office (section 37, subdivision 1);

(f) A director may call a board meeting, and the notice of the meeting need not state the purpose of the meeting (section 37, subdivision 3);

(g) A majority of the board is a quorum for a board meeting

(section 39);

(h) A committee shall consist of one or more persons, who need not be directors, appointed by affirmative vote of a majority of the directors present (section 42, subdivision 2);

(i) A majority of a committee is a quorum for a committee meeting, unless otherwise provided by a resolution of the board (section 42, subdivision 3);

(j) The board may establish a committee of disinterested persons (section 43);

(k) The chief executive officer and chief financial officer have specified duties, until the board determines otherwise (section 47);

(l) Officers may delegate some or all of their duties and powers, if not prohibited by the board from doing so (section 53);

(m) The board may establish uncertificated shares (section 60, subdivision 7);

(n) Regular meetings of shareholders need not be held, unless demanded by a shareholder under certain conditions (section 65);

(o) Not less than 10-days nor more than 60-days notice is required for a meeting of shareholders (section 67, subdivision 2);

(p) The number of shares required for a quorum at a shareholders meeting is a majority of the voting shares (section 70);

(q) The board may fix a date up to 50 days before the date of a shareholders' meeting as the date for the determination of the holders of voting shares entitled to notice of and to vote at the meeting (section 71, subdivision 1);

(r) Each share has one vote unless otherwise provided in the terms of the share (section 71, subdivision 3); and

(s) Indemnification of certain persons is required (section 84); and

(t) The board may authorize, and the corporation may make, distributions not prohibited, limited, or restricted by an agreement (section 85, subdivision 1).

Subd. 4. [OPTIONAL PROVISIONS: SPECIFIC SUBJECTS.] The following provisions relating to the management of the business or the regulation of the affairs of a corporation may be included either in the articles or, except for naming members of the first board or fixing a greater than majority director or shareholder vote, in the bylaws:

(a) The members of the first board may be named in the articles (section 26, subdivision 1);

(b) A manner for increasing or decreasing the number of directors may be provided (section 27);

(c) Additional qualifications for directors may be imposed (section 28);

(d) Directors may be classified (section 32);

(e) The day or date, time, and place of board meetings may be fixed (section 37, subdivision 1);

(f) Absent directors may be permitted to give written consent or opposition to a proposal (section 38);

(g) A larger than majority vote may be required for board action (section 40);

(h) Authority to sign and deliver certain documents may be delegated to an officer or agent of the corporation other than the chief executive officer (section 47, subdivision 2);

(i) Additional officers may be designated (section 48);

(j) Additional powers, rights, duties, and responsibilities may be given to officers (section 49);

(k) A method for filling vacant offices may be specified (section 52, subdivision 3);

(l) A certain officer or agent may be authorized to sign share certificates (section 60, subdivision 2);

(m) The transfer or registration of transfer of securities may be restricted (section 64);

(n) The day or date, time, and place of regular shareholder meetings may be fixed (section 65, subdivision 3);

(o) Certain persons may be authorized to call special meetings of shareholders (section 66, subdivision 1);

(p) Notices of shareholder meetings may be required to contain certain information (section 67, subdivision 3);

(q) A larger than majority vote may be required for shareholder action (section 68);

(r) Voting rights may be granted in or pursuant to the articles to persons who are not shareholders (section 71, subdivision 4);

(s) Corporate actions giving rise to dissenter rights may be designated (section 80, subdivision 1, clause (e)); and

(t) The rights and priorities of persons to receive distributions may be established (section 85).

Subd. 5. [OPTIONAL PROVISIONS: GENERALLY.] The articles may contain other provisions not inconsistent with law relating to the management of the business or the regulation of the affairs of the corporation.

Subd. 6. It is not necessary to set forth in the articles any of the corporate powers granted by sections 1 to 125.

Sec. 8. [302A.115] [CORPORATE NAME.]

Subdivision 1. [REQUIREMENTS; PROHIBITIONS.] The corporate name:

(a) Shall be in the English language or in any other language expressed in English letters or characters;

(b) Shall contain the word "corporation", "incorporated", or "limited", or shall contain an abbreviation of one or more of these words, or the word "company" or the abbreviation "Co." if that word or abbreviation is not immediately preceded by the word "and" or the character "&". This provision does not affect the right of a domestic corporation existing on January 1, 1983 or a foreign corporation authorized to do business in this state on that date to continue the use of its name;

(c) Shall not contain a word or phrase that indicates or implies that it is incorporated for a purpose other than one or more business purposes for which a corporation may be incorporated under sections 1 to 125;

(d) Shall not be the same as, or deceptively similar to, the name of a domestic corporation or a foreign corporation authorized to do business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in section 9 or in Minnesota Statutes, Sections 333.001 to

333.52, unless there is filed with the articles one of the following:

(1) The written consent of the domestic corporation or foreign corporation authorized to do business in this state having the same or a deceptively similar name or the holder of a reserved name to use the same or deceptively similar name;

(2) A certified copy of a final decree of a court in this state establishing the prior right of the applicant to the use of the name in this state; or

(3) The applicant's affidavit that the corporation with the same or deceptively similar name has been incorporated in this state for at least three years, if it is a domestic corporation, or has been authorized to do business in this state for at least three years, if it is a foreign corporation, and has not during the three year period filed any document with the secretary of state; that the applicant has mailed written notice to the corporation by certified mail, return receipt requested, properly addressed to the registered office of the corporation shown in the records of the secretary of state, that the applicant intends to use the same or deceptively similar name and the notice has been returned to the applicant as undeliverable to the addressee corporation; that the applicant, after diligent inquiry, has been unable to find any telephone listing for the corporation with the same or deceptively similar name in the county in which is located the registered office of the corporation shown in the records of the secretary of state; and that the applicant has no knowledge that the corporation is currently engaged in business in this state.

Subd. 2. [DETERMINATION.] The secretary of state shall determine whether a name is "deceptively similar" to another name for purposes of this section and section 9.

Subd. 3. [OTHER LAWS AFFECTING USE OF NAMES.] This section and section 9 do not abrogate or limit the law of unfair competition or unfair practices, nor Minnesota Statutes, Sections 333.001 to 333.52, nor the laws of the United States with respect to the right to acquire and protect copyrights, trade names, trademarks, service names, service marks, or any

other rights to the exclusive use of names or symbols, nor derogate the common law or the principles of equity.

Subd. 4. [USE OF NAME BY SUCCESSOR CORPORATION.] A corporation that is merged with another domestic or foreign corporation, or that is incorporated by the reorganization of one or more domestic or foreign corporations, or that acquires by sale, lease, or other disposition to or exchange with a domestic corporation all or substantially all of the assets of another domestic or foreign corporation including its name, may have the same name as that used in this state by any of the other corporations, if the other corporation was incorporated under the laws of, or is authorized to transact business in, this state.

Subd. 5. [INJUNCTION.] The use of a name by a corporation in violation of this section does not affect or vitiate its corporate existence, but a court in this state may, upon application of the state or of a person interested or affected, enjoin the corporation from doing business under a name assumed in violation of this section, although its articles may have been filed with the secretary of state and a certificate of incorporation issued.

Sec. 9. [302A.117] [RESERVED NAME.]

Subdivision 1. [WHO MAY RESERVE.] The exclusive right to the use of a corporate name otherwise permitted by section 8 may be reserved by:

(a) A person doing business in this state under that name or a name deceptively similar to that name;

(b) A person intending to incorporate a corporation under sections 1 to 125;

(c) A domestic corporation intending to change its name;

(d) A foreign corporation intending to make application for a certificate of authority to transact business in this state;

(e) A foreign corporation authorized to transact business in this state and intending to change its name;

(f) A person intending to incorporate a foreign corporation and intending to have the foreign corporation make application for a certificate of authority to transact business in this

state; or

(g) A foreign corporation doing business under that name or a name deceptively similar to that name in one or more states other than this state and not described in clauses (d), (e), or (f).

Subd. 2. [METHOD OF RESERVATION.] The reservation shall be made by filing with the secretary of state a request that the name be reserved. If the name is available for use by the applicant, the secretary of state shall reserve the name for the exclusive use of the applicant for a period of 12 months. The reservation may be renewed for successive 12 month periods.

Subd. 3. [TRANSFER OF RESERVATION.] The right to the exclusive use of a corporate name reserved pursuant to this section may be transferred to another person by or on behalf of the applicant for whom the name was reserved by filing with the secretary of state a notice of the transfer and specifying the name and address of the transferee.

Sec. 10. [302A.121] [REGISTERED OFFICE; REGISTERED AGENT.]

Subdivision 1. [REGISTERED OFFICE.] A corporation shall continuously maintain a registered office in this state. A registered office need not be the same as the principal place of business or the principal executive office of the corporation.

Subd. 2. [REGISTERED AGENT.] A corporation may designate in its articles a registered agent. The registered agent may be a natural person residing in this state, a domestic corporation, or a foreign corporation authorized to transact business in this state. The registered agent must maintain a business office that is identical with the registered office.

Sec. 11. [302A.123] [CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT.]

Subdivision 1. [STATEMENT.] A corporation may change its registered office or designate or change its registered agent by filing with the secretary of state a statement containing:

(a) The name of the corporation;

(b) The present address of its registered office;

(c) If the address of its registered office is to be changed, the new address of its registered office;

(d) The name of its registered agent, if any;

(e) If its registered agent is to be designated or changed, the name of its new registered agent;

(f) A statement that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical; and

(g) A statement that the change was authorized by resolution approved by the affirmative vote of a majority of the directors present.

Subd. 2. [RESIGNATION OF AGENT.] A registered agent of a corporation may resign by filing with the secretary of state a duplicate signed written notice of resignation. The secretary of state shall forward one of the filed originals to the corporation at its registered office. The appointment of the agent terminates 30 days after the notice is filed with the secretary of state.

Subd. 3. [CHANGE OF BUSINESS ADDRESS OF AGENT.] If the business address of a registered agent changes, the agent shall change the address of the registered office of each corporation represented by that agent by filing with the secretary of state a statement as required in subdivision 1, except that it need be signed only by the registered agent, need not be responsive to clauses (e) or (g), and must recite that a copy of the statement has been mailed to each of those corporations.

Sec. 12. [302A.131] [AMENDMENT OF ARTICLES.]

A corporation may at any time amend its articles to include or modify any provision that is required or permitted to appear in the articles or to omit any provision not required to be included in the articles.

Sec. 13. [302A.133] [PROCEDURE FOR AMENDMENT BEFORE ISSUANCE OF SHARES.]

Before the issuance of shares by a corporation, the articles may be amended pursuant to section 24 by the incorporators or by the board.

Sec. 14. [302A.135] [PROCEDURE FOR AMENDMENT AFTER ISSUANCE OF SHARES.]

Subdivision 1. [MANNER OF AMENDMENT.] After the issuance

of shares by the corporation, the articles may be amended in the manner set forth in this section.

Subd. 2. [SUBMISSION TO SHAREHOLDERS.] A resolution approved by the affirmative vote of a majority of the directors present, or proposed by a shareholder or shareholders holding one percent or more of all voting shares, that sets forth the proposed amendment shall be submitted to a vote at the next regular or special meeting of the shareholders of which notice can be timely given. Any number of amendments may be submitted to the shareholders and voted upon at one meeting, but the same or substantially the same amendment proposed by a shareholder or shareholders need not be submitted to the shareholders or be voted upon at more than one meeting during a 15-month period. The resolution may amend the articles in their entirety to restate and supersede the original articles and all amendments to them. An amendment that restates the articles need not set forth the names or addresses of the incorporators nor of any former directors or registered agents.

Subd. 3. [NOTICE.] Written notice of the shareholders' meeting setting forth the substance of the proposed amendment shall be given to each shareholder in the manner provided in section 67 for the giving of notice of meetings of shareholders.

Subd. 4. [APPROVAL BY SHAREHOLDERS.] (a) The proposed amendment is adopted when approved by the affirmative vote of the holders of a majority of the voting shares present, except as provided in paragraph (b).

(b) If the articles provide for a specified proportion or number equal to or larger than the majority necessary to transact a specified type of business at a meeting, or if it is proposed to amend the articles to provide for a specified proportion or number equal to or larger than the majority necessary to transact a specified type of business at a meeting, the affirmative vote necessary to add the provision to, or to amend an existing provision in, the articles is the larger of:

(1) The specified proportion or number or, in the absence of a specific provision, the affirmative vote necessary to transact the type of business described in the proposed

amendment at a meeting immediately before the effectiveness of the proposed amendment; or

(2) The specified proportion or number that would, upon effectiveness of the proposed amendment, be necessary to transact the specified type of business at a meeting.

Sec. 15. [302A.137] [CLASS OR SERIES VOTING ON AMENDMENTS.]

The holders of the outstanding shares of a class or series are entitled to vote as a class or series upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles, if the amendment would:

(a) Increase or decrease the aggregate number of authorized shares of the class or series;

(b) Increase or decrease the par value of the shares of the class or series;

(c) Effect an exchange, reclassification, or cancellation of all or part of the shares of the class or series;

(d) Effect an exchange, or create a right of exchange, of all or any part of the shares of another class or series for the shares of the class or series;

(e) Change the rights or preferences of the shares of the class or series;

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

(g) Create a new class or series of shares having rights and preferences prior and superior to the shares of that class or series, or increase the rights and preferences or the number of authorized shares, of a class or series having rights and preferences prior or superior to the shares of that class or series;

(h) Divide the shares of the class into series and determine the designation of each series and the variations in the relative rights and preferences between the shares of each series, or authorize the board to do so;

(i) Limit or deny any existing preemptive rights of the

shares of the class or series; or

(j) Cancel or otherwise affect distributions on the shares of the class or series that have accrued but have not been declared.

Sec. 16. [302A.139] [ARTICLES OF AMENDMENT.]

When an amendment has been adopted, articles of amendment shall be prepared that contain:

(a) The name of the corporation;

(b) The amendment adopted;

(c) The date of the adoption of the amendment by the shareholders, or by the incorporators or the board where no shares have been issued;

(d) If the amendment provides for but does not establish the manner for effecting an exchange, reclassification, or cancellation of issued shares, a statement of the manner in which it will be effected; and

(e) If the amendment restates the articles in their entirety, a statement that the restated articles supersede the original articles and all amendments to them.

Sec. 17. [302A.141] [EFFECT OF AMENDMENT.]

Subdivision 1. [EFFECT ON CAUSE OF ACTION.] An amendment does not affect an existing cause of action in favor of or against the corporation, nor a pending suit to which the corporation is a party, nor the existing rights of persons other than shareholders.

Subd. 2. [EFFECT OF CHANGE OF NAME.] If the corporate name is changed by the amendment, a suit brought by or against the corporation under its former name does not abate for that reason.

Sec. 18. [302A.151] [FILING ARTICLES.]

Articles of incorporation and articles of amendment shall be filed with the secretary of state.

Sec. 19. [302A.153] [EFFECTIVE DATE OF ARTICLES.]

Articles of incorporation are effective and corporate existence begins when the articles of incorporation are filed with the secretary of state. Articles of amendment are effective when filed with the secretary of state or at another time within 30 days after filing if the articles of amendment so

provide.

Sec. 20. [302A.155] [PRESUMPTION; CERTIFICATE OF INCORPORATION.]

When the articles of incorporation have been filed with the secretary of state, it is presumed that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated, and the secretary of state shall issue a certificate of incorporation to the corporation, but this presumption does not apply against this state in a proceeding to cancel or revoke the certificate of incorporation or to compel the involuntary dissolution of the corporation.

POWERS

Sec. 21. [302A.161] [POWERS.]

Subdivision 1. [GENERALLY; LIMITATIONS.] A corporation has the powers set forth in this section, subject to any limitations provided in any other statute of this state or in its articles.

Subd. 2. [DURATION.] A corporation has perpetual duration.

Subd. 3. [LEGAL CAPACITY.] A corporation may sue and be sued, complain and defend and participate as a party or otherwise in any legal, administrative, or arbitration proceeding, in its corporate name.

Subd. 4. [PROPERTY OWNERSHIP.] A corporation may purchase, lease, or otherwise acquire, own, hold, improve, use, and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

Subd. 5. [PROPERTY DISPOSITION.] A corporation may sell, convey, mortgage, create a security interest in, lease, exchange, transfer, or otherwise dispose of all or any part of its real or personal property, or any interest therein, wherever situated.

Subd. 6. [TRADING IN SECURITIES; OBLIGATIONS.] A corporation may purchase, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, exchange, mortgage, lend, create a security interest in, or otherwise dispose of and otherwise use and deal in and with, securities or other interests in, or obligations of, a person or direct or indirect

obligations of any domestic or foreign government or instrumentality thereof.

Subd. 7. [CONTRACTS; MORTGAGES.] A corporation may make contracts and incur liabilities, borrow money, issue its securities, and secure any of its obligations by mortgage of or creation of a security interest in all or any of its property, franchises and income.

Subd. 8. [INVESTMENT.] A corporation may invest and reinvest its funds.

Subd. 9. [HOLDING PROPERTY AS SECURITY.] A corporation may take and hold real and personal property, whether or not of a kind sold or otherwise dealt in by the corporation, as security for the payment of money loaned, advanced, or invested.

Subd. 10. [LOCATION.] A corporation may conduct its business, carry on its operations, have offices, and exercise the powers granted by sections 1 to 125 anywhere in the universe.

Subd. 11. [DONATIONS.] A corporation may make donations, irrespective of corporate benefit, for the public welfare; for social, community, charitable, religious, educational, scientific, civic, literary, and testing for public safety purposes, and for similar or related purposes; for the purpose of fostering national or international amateur sports competition; for the prevention of cruelty to children and animals; and, in time of war or other national emergency, for any and all purposes in aid thereof.

Subd. 12. [WAR; NATIONAL EMERGENCY.] At the request of the government of the United States or of this state or any of their respective agencies, a corporation may transact any lawful business in time of war or other national emergency, notwithstanding any limitation on the purposes set forth in its articles.

Subd. 13. [PENSIONS; BENEFITS.] A corporation may pay pensions, retirement allowances, and compensation for past services to and for the benefit of, and establish, maintain, continue, and carry out, wholly or partially at the expense of the corporation, employee or incentive benefit plans, trusts, and provisions to or for the benefit of, any or all of its and

its related corporations' officers, directors, employees, and agents and the families, dependents, and beneficiaries of any of them. It may indemnify and purchase and maintain insurance for and on behalf of a fiduciary of any of these employee benefit and incentive plans, trusts, and provisions.

Subd. 14. [PARTICIPATING IN MANAGEMENT.] A corporation may participate in any capacity in the promotion, organization, ownership, management, and operation of any organization or in any transaction, undertaking, or arrangement that the participating corporation would have power to conduct by itself, whether or not the participation involves sharing or delegation of control with or to others.

Subd. 15. [INSURANCE.] A corporation may provide for its benefit life insurance and other insurance with respect to the services of any or all of its officers, directors, employees, and agents, or on the life of a shareholder for the purpose of acquiring at the death of the shareholder any or all shares in the corporation owned by the shareholder.

Subd. 16. [CORPORATE SEAL.] A corporation may have, alter at pleasure, and use a corporate seal as provided in section 22.

Subd. 17. [BYLAWS.] A corporation may adopt, amend, and repeal bylaws relating to the management of the business or the regulation of the affairs of the corporation as provided in section 25.

Subd. 18. [COMMITTEES.] A corporation may establish committees of the board of directors, elect or appoint persons to the committees, and define their duties as provided in sections 42 and 43 and fix their compensation.

Subd. 19. [OFFICERS; EMPLOYEES; AGENTS.] A corporation may elect or appoint officers, employees, and agents of the corporation, and define their duties as provided in sections 46 to 54 and fix their compensation.

Subd. 20. [SECURITIES.] A corporation may issue securities and rights to purchase securities as provided in sections 55 to 63.

Subd. 21. [LOANS; GUARANTIES; SURETIES.] A corporation may lend money to, guarantee an obligation of, become a surety for,

or otherwise financially assist persons as provided in section 82.

Subd. 22. [ADVANCES.] A corporation may make advances to its directors, officers, and employees and those of its subsidiaries as provided in section 83.

Subd. 23. [INDEMNIFICATION.] A corporation shall indemnify persons against certain expenses and liabilities only as provided in section 84.

Subd. 24. [ASSUMED NAMES.] A corporation may conduct all or part of its business under one or more assumed names as provided in Minnesota Statutes, Sections 333.001 to 333.06.

Subd. 25. [OTHER POWERS.] A corporation may have and exercise all other powers necessary or convenient to effect any or all of the business purposes for which the corporation is incorporated.

Sec. 22. [302A.163] [CORPORATE SEAL.]

Subdivision 1. [SEAL NOT REQUIRED.] A corporation may, but need not, have a corporate seal, and the use or nonuse of a corporate seal does not affect the validity or enforceability of a document or act. If a corporation has a corporate seal, the use of the seal by the corporation on a document is not necessary.

Subd. 2. [REQUIRED WORDS; USE.] If a corporation has a corporate seal, the seal may consist of a mechanical imprinting device, or a rubber stamp with a facsimile of the seal affixed thereon, or a facsimile or reproduction of either. The seal need include only the word "Seal", but it may also include a part or all of the name of the corporation and a combination, derivation, or abbreviation of either or both of the phrases "a Minnesota Corporation" and "Corporate Seal". If a corporate seal is used, it or a facsimile of it may be affixed, engraved, printed, placed, stamped with indelible ink, or in any other manner reproduced on any document.

Sec. 23. [302A.165] [EFFECT OF LACK OF POWER; ULTRA VIRES.]

The doing, continuing, or performing by a corporation of an act, or an executed or wholly or partially executory contract,

conveyance or transfer to or by the corporation, if otherwise lawful, is not invalid because the corporation was without the power to do, continue, or perform the act, contract, conveyance, or transfer, unless the lack of power is established in a court in this state:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing, continuing, or performing of the act, contract, conveyance, or transfer. If the unauthorized act, continuation, or performance sought to be enjoined is being, or to be, performed or made pursuant to a contract to which the corporation is a party, the court may, if just and reasonable in the circumstances, set aside and enjoin the performance of the contract and in so doing may allow to the corporation or to the other parties to the contract compensation for the loss or damage sustained as a result of the action of the court in setting aside and enjoining the performance of the contract;

(b) In a proceeding by or in the name of the corporation, whether acting directly or through a legal representative, or through shareholders in a representative or derivative suit, against the incumbent or former officers or directors of the corporation for exceeding or otherwise violating their authority, or against a person having actual knowledge of the lack of power; or

(c) In a proceeding by the attorney general, as provided in section 111, to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from the transaction of unauthorized business.

ORGANIZATION; BYLAWS

Sec. 24. [302A.171] [ORGANIZATION.]

Subdivision 1. [ROLE OF INCORPORATORS.] If the first board is not named in the articles, the incorporators may elect the first board or may act as directors, in the same manner as directors, with all of the powers, rights, duties, and liabilities of directors, until directors are elected, until shares are issued, or until the organization of the corporation is complete, whichever occurs first.

Subd. 2. [MEETING.] After the issuance of the certificate of incorporation, the incorporators or the directors named in the articles shall either hold an organizational meeting at the call of a majority of the incorporators or of the directors named in the articles, or take written action, for the purposes of transacting business and taking actions necessary or appropriate to complete the organization of the corporation, including, without limitation, amending the articles, electing directors, adopting bylaws, electing officers, adopting banking resolutions, authorizing or ratifying the purchase, lease, or other acquisition of suitable space, furniture, furnishings, supplies, and materials, approving a corporate seal, approving forms of certificates or transaction statements for shares of the corporation, adopting a fiscal year for the corporation, accepting subscriptions for and issuing shares of the corporation, and making any appropriate tax elections. If a meeting is held, the person or persons calling the meeting shall give at least three days notice of the meeting to each incorporator or director named, stating the date, time, and place of the meeting.

Sec. 25. [302A.181] [BYLAWS.]

Subdivision 1. [GENERALLY.] A corporation may, but need not, have bylaws. Bylaws may contain any provision relating to the management of the business or the regulation of the affairs of the corporation not inconsistent with law or the articles.

Subd. 2. [POWER OF BOARD.] Initial bylaws may be adopted pursuant to section 24 by the incorporators or by the first board. Unless reserved by the articles to the shareholders, the power to adopt, amend, or repeal the bylaws is vested in the board. The power of the board is subject to the power of the shareholders, exercisable in the manner provided in subdivision 3, to adopt, amend, or repeal bylaws adopted, amended, or repealed by the board. After the adoption of the initial bylaws, the board shall not adopt, amend, or repeal a bylaw fixing a quorum for meetings of shareholders, prescribing procedures for removing directors or filling vacancies in the board, or fixing the number of directors or their

classifications, qualifications, or terms of office, but may adopt or amend a bylaw to increase the number of directors.

Subd. 3. [POWER OF SHAREHOLDERS; PROCEDURE.] If a shareholder or shareholders holding one percent or more of all voting shares propose a resolution for action by the shareholders to adopt, amend, or repeal bylaws adopted, amended, or repealed by the board and the resolution sets forth the provision or provisions proposed for adoption, amendment, or repeal, the limitations and procedures for submitting, considering, and adopting the resolution are the same as provided in section 14, subdivisions 2 to 4, for amendment of the articles.

BOARD

Sec. 26. [302A.201] [BOARD.]

Subdivision 1. [BOARD TO MANAGE.] The business and affairs of a corporation shall be managed by or under the direction of a board, subject to the provisions of subdivision 2 and section 76. The members of the first board may be named in the articles or elected by the incorporators pursuant to section 24 or by the shareholders.

Subd. 2. [SHAREHOLDER MANAGEMENT.] The holders of the voting shares of the corporation may, by unanimous affirmative vote, take any action that sections 1 to 125 require or permit the board to take or the shareholders to take after action or approval of the board. As to an action taken by the shareholders in that manner:

(a) The directors have no duties, liabilities, or responsibilities as directors under sections 1 to 125 with respect to or arising from the action;

(b) The shareholders collectively and individually have all of the duties, liabilities, and responsibilities of directors under sections 1 to 125 with respect to and arising from the action;

(c) If the action relates to a matter required or permitted by sections 1 to 125 or by any other law to be approved or adopted by the board, either with or without approval or adoption by the shareholders, the action is deemed to have been

approved or adopted by the board; and

(d) A requirement that an instrument filed with a governmental agency contain a statement that the action has been approved and adopted by the board is satisfied by a statement that the shareholders have taken the action under this subdivision.

Sec. 27. [302A.203] [NUMBER.]

The board shall consist of one or more directors. The number of directors shall be fixed by, or in the manner provided in, the articles or bylaws. The number of directors may be increased or, subject to section 35, decreased at any time by amendment to, or in the manner provided in, the articles or bylaws.

Sec. 28. [302A.205] [QUALIFICATIONS; ELECTION.]

Directors shall be natural persons. The method of election and any additional qualifications for directors may be imposed by or in the manner provided in the articles or bylaws.

Sec. 29. [302A.207] [TERMS.]

Unless fixed terms are provided for in the articles or bylaws, a director serves for an indefinite term that expires at the next regular meeting of the shareholders. The term of a director shall not exceed five years. A director holds office for the term for which the director was elected and until a successor is elected and has qualified, or until the earlier death, resignation, removal, or disqualification of the director.

Sec. 30. [302A.209] [ACTS NOT VOID OR VOIDABLE.]

The expiration of a director's term with or without the election of a qualified successor does not make prior or subsequent acts of the officers or the board void or voidable.

Sec. 31. [302A.211] [COMPENSATION.]

Subject to any limitations in the articles or bylaws, the board may fix the compensation of directors.

Sec. 32. [302A.213] [CLASSIFICATION OF DIRECTORS.]

Directors may be divided into classes as provided in the articles or bylaws.

Sec. 33. [302A.215] [CUMULATIVE VOTING FOR DIRECTORS.]

Unless the articles provide that there shall be no

cumulative voting, and except as provided in section 35, subdivision 5, each shareholder entitled to vote for directors has the right to cumulate those votes in the election of directors by giving written notice of intent to cumulate those votes to the presiding officer at the meeting at which the election is to occur at any time before the election of directors at the meeting, in which case:

(a) The presiding officer at the meeting shall announce, before the election of directors, that shareholders shall cumulate their votes; and

(b) Each shareholder shall cumulate those votes either by casting for one candidate the number of votes equal to the number of directors to be elected multiplied by the number of votes represented by the shares, or by distributing all of those votes on the same principle among any number of candidates.

Sec. 34. [302A.221] [RESIGNATION.]

A director may resign at any time by giving written notice to the corporation. The resignation is effective without acceptance when the notice is given to the corporation, unless a later effective time is specified in the notice.

Sec. 35. [302A.223] [REMOVAL OF DIRECTORS.]

Subdivision 1. [MODIFICATION.] The provisions of this section apply unless modified by the articles, the bylaws, or an agreement described in section 76.

Subd. 2. [REMOVAL BY DIRECTORS.] A director may be removed at any time, with or without cause, by the affirmative vote of a majority of the directors present, if:

(a) The director was named by the board to fill a vacancy;

(b) The shareholders have not elected directors in the interval between the time of the appointment to fill a vacancy and the time of the removal; and

(c) A majority of the remaining directors vote to remove the director.

Subd. 3. [REMOVAL BY SHAREHOLDERS.] Any one or all of the directors may be removed at any time, with or without cause, by the affirmative vote of the holders of the proportion or number of the voting shares of the classes or series the director

represents sufficient to elect them, except as provided in subdivision 4.

Subd. 4. [EXCEPTION FOR CORPORATIONS WITH CUMULATIVE VOTING.] In a corporation having cumulative voting, unless the entire board is removed simultaneously, a director is not removed from the board if there are cast against removal of the director the votes of a number of shares sufficient to elect the director at an election of the entire board under cumulative voting.

Subd. 5. [ELECTION OF REPLACEMENTS.] New directors may be elected at a meeting at which directors are removed. If the corporation allows cumulative voting and a shareholder notifies the presiding officer at any time prior to the election of new directors of intent to cumulate the votes of the shareholder, the presiding officer shall announce before the election that cumulative voting is in effect, and shareholders shall cumulate their votes as provided in section 33, clause (b).

Sec. 36. [302A.225] [VACANCIES.]

Unless different rules for filling vacancies are provided for in the articles or bylaws:

(a) (1) Vacancies on the board resulting from the death, resignation, removal, or disqualification of a director may be filled by the affirmative vote of a majority of the remaining directors, even though less than a quorum; and

(2) Vacancies on the board resulting from newly created directorships may be filled by the affirmative vote of a majority of the directors serving at the time of the increase; and

(b) Each director elected under this section to fill a vacancy holds office until a qualified successor is elected by the shareholders at the next regular or special meeting of the shareholders.

Sec. 37. [302A.231] [BOARD MEETINGS.]

Subdivision 1. [TIME; PLACE.] Meetings of the board may be held from time to time as provided in the articles or bylaws at any place within or without the state that the board may select or by any means described in subdivision 2. If the board fails

to select a place for a meeting, the meeting shall be held at the principal executive office, unless the articles or bylaws provide otherwise.

Subd. 2. [ELECTRONIC COMMUNICATIONS.] (a) A conference among directors by any means of communication through which the directors may simultaneously hear each other during the conference constitutes a board meeting, if the same notice is given of the conference as would be required by subdivision 3 for a meeting, and if the number of directors participating in the conference would be sufficient to constitute a quorum at a meeting. Participation in a meeting by that means constitutes presence in person at the meeting.

(b) A director may participate in a board meeting not described in paragraph (a) by any means of communication through which the director, other directors so participating, and all directors physically present at the meeting may simultaneously hear each other during the meeting. Participation in a meeting by that means constitutes presence in person at the meeting.

Subd. 3. [CALLING MEETINGS; NOTICE.] Unless the articles or bylaws provide for a different time period, a director may call a board meeting by giving ten days notice to all directors of the date, time, and place of the meeting. The notice need not state the purpose of the meeting unless the articles or bylaws require it.

Subd. 4. [PREVIOUSLY SCHEDULED MEETINGS.] If the day or date, time, and place of a board meeting have been provided in the articles or bylaws, or announced at a previous meeting of the board, no notice is required. Notice of an adjourned meeting need not be given other than by announcement at the meeting at which adjournment is taken.

Subd. 5. [WAIVER OF NOTICE.] A director may waive notice of a meeting of the board. A waiver of notice by a director entitled to notice is effective whether given before, at, or after the meeting, and whether given in writing, orally, or by attendance. Attendance by a director at a meeting is a waiver of notice of that meeting, except where the director objects at the beginning of the meeting to the transaction of business

because the meeting is not lawfully called or convened and does not participate thereafter in the meeting.

Sec. 38. [302A.233] [ABSENT DIRECTORS.]

If the articles or bylaws so provide, a director may give advance written consent or opposition to a proposal to be acted on at a board meeting. If the director is not present at the meeting, consent or opposition to a proposal does not constitute presence for purposes of determining the existence of a quorum, but consent or opposition shall be counted as a vote in favor of or against the proposal and shall be entered in the minutes or other record of action at the meeting, if the proposal acted on at the meeting is substantially the same or has substantially the same effect as the proposal to which the director has consented or objected.

Sec. 39. [302A.235] [QUORUM.]

A majority, or a larger or smaller proportion or number provided in the articles or bylaws, of the directors currently holding office present at a meeting is a quorum for the transaction of business. In the absence of a quorum, a majority of the directors present may adjourn a meeting from time to time until a quorum is present. If a quorum is present when a duly called or held meeting is convened, the directors present may continue to transact business until adjournment, even though the withdrawal of a number of directors originally present leaves less than the proportion or number otherwise required for a quorum.

Sec. 40. [302A.237] [ACT OF THE BOARD.]

The board shall take action by the affirmative vote of a majority of directors present at a duly held meeting, except where sections 1 to 125 or the articles require the affirmative vote of a larger proportion or number. If the articles require a larger proportion or number than is required by sections 1 to 125 for a particular action, the articles shall control.

Sec. 41. [302A.239] [ACTION WITHOUT MEETING.]

Subdivision 1. [METHOD.] An action required or permitted to be taken at a board meeting may be taken by written action signed by all of the directors unless the action need not be

approved by the shareholders and the articles so provide, in which case, the action may be taken by written action signed by the smaller number of directors that would be required to take the same action at a meeting of the board at which all directors were present.

Subd. 2. [EFFECTIVE TIME.] The written action is effective when signed by the required number of directors, unless a different effective time is provided in the written action.

Subd. 3. [NOTICE; LIABILITY.] When written action is permitted to be taken by less than all directors, all directors shall be notified immediately of its text and effective date. Failure to provide the notice does not invalidate the written action. A director who does not sign or consent to the written action has no liability for the action or actions taken thereby.

Sec. 42. [302A.241] [COMMITTEES.]

Subdivision 1. [GENERALLY.] A resolution approved by the affirmative vote of a majority of the board may establish committees having the authority of the board in the management of the business of the corporation to the extent provided in the resolution. Committees are subject at all times to the direction and control of the board, except as provided in section 43.

Subd. 2. [MEMBERSHIP.] Committee members shall be natural persons. Unless the articles or bylaws provide for a different membership, a committee shall consist of one or more persons, who need not be directors, appointed by affirmative vote of a majority of the directors present.

Subd. 3. [QUORUM.] A majority of the members of the committee present at a meeting is a quorum for the transaction of business, unless a larger or smaller proportion or number is provided in the articles or bylaws or in a resolution approved by the affirmative vote of a majority of the directors present.

Subd. 4. [PROCEDURE.] Sections 37 to 41 apply to committees and members of committees to the same extent as those sections apply to the board and directors.

Subd. 5. [MINUTES.] Minutes, if any, of committee meetings shall be made available upon request to members of the committee

and to any director.

Subd. 6. [STANDARD OF CONDUCT.] The establishment of, delegation of authority to, and action by a committee does not alone constitute compliance by a director with the standard of conduct set forth in section 44.

Subd. 7. [COMMITTEE MEMBERS DEEMED DIRECTORS.] Committee members are deemed to be directors for purposes of sections 44, 45, and 84.

Sec. 43. [302A.243] [COMMITTEE OF DISINTERESTED PERSONS.]

Unless prohibited by the articles or bylaws, the board may establish a committee composed of two or more disinterested directors or other disinterested persons to determine whether or not it is in the best interests of the corporation to pursue a particular legal right or remedy of the corporation and whether to cause the dismissal or discontinuance of a particular proceeding that seeks to assert a right or remedy on behalf of the corporation. For purposes of this section, a director or other person is "disinterested" if the director is not the owner of more than one percent of the outstanding shares of, or a present or former officer, employee, or agent of, the corporation or of a related corporation and has not been made or threatened to be made a party to the proceeding in question. The committee, once established, is not subject to the direction or control of, or termination by, the board. A vacancy on the committee may be filled by a majority vote of the remaining members. The good faith determinations of the committee are binding upon the corporation and its directors, officers, and shareholders. The committee terminates when it issues a written report of its determinations.

Sec. 44. [302A.251] [STANDARD OF CONDUCT.]

Subdivision 1. [STANDARD; LIABILITY.] A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A person who so performs those duties is not liable by reason of being or having been a director of the

corporation.

Subd. 2. [RELIANCE.] (a) A director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence; or

(3) A committee of the board upon which the director does not serve, duly established in accordance with sections 39 and 40, as to matters within its designated authority, if the director reasonably believes the committee to merit confidence.

(b) Paragraph (a) does not apply to a director who has knowledge concerning the matter in question that makes the reliance otherwise permitted by paragraph (a) unwarranted.

Subd. 3. [PRESUMPTION OF ASSENT; DISSENT.] A director who is present at a meeting of the board when an action is approved by the affirmative vote of a majority of the directors present is presumed to have assented to the action approved, unless the director:

(a) Objects at the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened and does not participate thereafter in the meeting; or

(b) Votes against the action at the meeting.

Sec. 45. [302A.255] [DIRECTOR CONFLICTS OF INTEREST.]

Subdivision 1. [CONFLICT; PROCEDURE WHEN CONFLICT ARISES.] A contract or other transaction between a corporation and one or more of its directors, or between a corporation and an organization in or of which one or more of its directors are directors, officers, or legal representatives or have a material financial interest, is not void or voidable because the director or directors or the other organizations are parties or because the director or directors are present at the meeting of the

shareholders or the board or a committee at which the contract or transaction is authorized, approved, or ratified, if:

(a) The contract or transaction was, and the person asserting the validity of the contract or transaction sustains the burden of establishing that the contract or transaction was, fair and reasonable as to the corporation at the time it was authorized, approved, or ratified;

(b) The material facts as to the contract or transaction and as to the director's or directors' interest are fully disclosed or known to the shareholders and the contract or transaction is approved in good faith by the holders of a majority of the outstanding shares, but shares owned by the interested director or directors shall not be counted in determining the presence of a quorum and shall not be voted; or

(c) The material facts as to the contract or transaction and as to the director's or directors' interest are fully disclosed or known to the board or a committee, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a majority of the board or committee, but the interested director or directors shall not be counted in determining the presence of a quorum and shall not vote.

Subd. 2. [MATERIAL FINANCIAL INTEREST.] For purposes of this section:

(a) A director does not have a material financial interest in a resolution fixing the compensation of another director as a director, officer, employee, or agent of the corporation, even though the first director is also receiving compensation from the corporation; and

(b) A director has a material financial interest in each organization in which the director, or the spouse, parents, children and spouses of children, brothers and sisters and spouses of brothers and sisters of the director, or any combination of them have a material financial interest.

OFFICERS

Sec. 46. [302A.301] [OFFICERS REQUIRED.]

A corporation shall have one or more natural persons

exercising the functions of the offices, however designated, of chief executive officer and chief financial officer.

Sec. 47. [302A.305] [DUTIES OF REQUIRED OFFICERS.]

Subdivision 1. [PRESUMPTION; MODIFICATION.] Unless the articles, the bylaws, or a resolution adopted by the board and not inconsistent with the articles or bylaws provide otherwise, the chief executive officer and chief financial officer have the duties specified in this section.

Subd. 2. [CHIEF EXECUTIVE OFFICER.] The chief executive officer shall:

(a) Have general active management of the business of the corporation;

(b) When present, preside at all meetings of the board and of the shareholders;

(c) See that all orders and resolutions of the board are carried into effect;

(d) Sign and deliver in the name of the corporation any deeds, mortgages, bonds, contracts or other instruments pertaining to the business of the corporation, except in cases in which the authority to sign and deliver is required by law to be exercised by another person or is expressly delegated by the articles or bylaws or by the board to some other officer or agent of the corporation;

(e) Maintain records of and, whenever necessary, certify all proceedings of the board and the shareholders; and

(f) Perform other duties prescribed by the board.

Subd. 3. [CHIEF FINANCIAL OFFICER.] The chief financial officer shall:

(a) Keep accurate financial records for the corporation;

(b) Deposit all money, drafts, and checks in the name of and to the credit of the corporation in the banks and depositories designated by the board;

(c) Endorse for deposit all notes, checks, and drafts received by the corporation as ordered by the board, making proper vouchers therefor;

(d) Render to the chief executive officer and the board, whenever requested, an account of all transactions by the chief

financial officer and of the financial condition of the corporation;

(e) In the absence of the chief executive officer, preside at all meetings of the board and of the shareholders; and

(f) Perform other duties prescribed by the board or by the chief executive officer.

Sec. 48. [302A.311] [OTHER OFFICERS.]

The board may elect or appoint, in a manner set forth in the articles or bylaws or in a resolution approved by the affirmative vote of a majority of the directors present, any other officers or agents the board deems necessary for the operation and management of the corporation, each of whom shall have the powers, rights, duties, responsibilities, and terms in office provided for in the articles or bylaws or determined by the board.

Sec. 49. [302A.315] [MULTIPLE OFFICES.]

Any number of offices or functions of those offices may be held or exercised by the same person. If a document must be signed by persons holding different offices or functions and a person holds or exercises more than one of those offices or functions, that person may sign the document in more than one capacity, but only if the document indicates each capacity in which the person signs.

Sec. 50. [302A.321] [OFFICERS DEEMED ELECTED.]

In the absence of an election or appointment of officers by the board, the person or persons exercising the principal functions of the chief executive officer or the chief financial officer are deemed to have been elected to those offices, except for the purpose of determining the location of the principal executive office, which in that case is the registered office of the corporation.

Sec. 51. [302A.331] [CONTRACT RIGHTS.]

The election or appointment of a person as an officer or agent does not, of itself, create contract rights. A corporation may enter into a contract with an officer or agent for a period of time if, in the board's judgment, the contract would be in the best interests of the corporation. The fact

that the contract may be for a term longer than the terms of the directors who authorized or approved the contract does not make the contract void or voidable.

Sec. 52. [302A.341] [RESIGNATION; REMOVAL; VACANCIES.]

Subdivision 1. [RESIGNATION.] An officer may resign at any time by giving written notice to the corporation. The resignation is effective without acceptance when the notice is given to the corporation, unless a later effective date is specified in the notice.

Subd. 2. [REMOVAL.] An officer may be removed at any time, with or without cause, by a resolution approved by the affirmative vote of a majority of the directors present, subject to the provisions of a shareholder control agreement. The removal is without prejudice to any contractual rights of the officer.

Subd. 3. [VACANCY.] A vacancy in an office because of death, resignation, removal, disqualification, or other cause may, or in the case of a vacancy in the office of chief executive officer or chief financial officer shall, be filled for the unexpired portion of the term in the manner provided in the articles or bylaws, or determined by the board, or pursuant to section 50.

Sec. 53. [302A.351] [DELEGATION.]

Unless prohibited by the articles or bylaws or by a resolution approved by the affirmative vote of a majority of the directors present, an officer elected or appointed by the board may, without the approval of the board, delegate some or all of the duties and powers of an office to other persons. An officer who delegates the duties or powers of an office remains subject to the standard of conduct for an officer with respect to the discharge of all duties and powers so delegated.

Sec. 54. [302A.361] [STANDARD OF CONDUCT.]

An officer shall discharge the duties of an office in good faith, in a manner the officer reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A person exercising the principal

functions of an office or to whom some of all of the duties and powers of an office are delegated pursuant to section 53 is deemed an officer for purposes of this section and sections 79 and 84.

SHARES; SHAREHOLDERS

Sec. 55. [302A.401] [AUTHORIZED SHARES.]

Subdivision 1. [BOARD MAY AUTHORIZE.] Subject to any restrictions in the articles, a corporation may issue securities and rights to purchase securities when authorized by the board.

Subd. 2. [TERMS OF SHARES.] All the shares of a corporation:

(a) Shall be of one class and one series, unless the articles establish, or authorize the board to establish, more than one class or series;

(b) Shall be common voting shares having equal rights and preferences in all matters not otherwise provided for by the board, unless and to the extent that the articles have fixed the relative rights and preferences of different classes and series; and

(c) Shall have, unless a different par value is specified in the articles, a par value of one cent per share, solely for the purpose of a statute or regulation imposing a tax or fee based upon the capitalization of a corporation, and a par value fixed by the board for the purpose of a statute or regulation requiring the shares of the corporation to have a par value.

Subd. 3. [PROCEDURE FOR FIXING TERMS.] (a) Subject to any restrictions in the articles, the power granted in subdivision 2 may be exercised by a resolution approved by the affirmative vote of a majority of the directors present establishing a class or series, setting forth the designation of the class or series, and fixing the relative rights and preferences of the class or series.

(b) A statement setting forth the name of the corporation and the text of the resolution and certifying the adoption of the resolution and the date of adoption shall be filed with the secretary of state before the issuance of any shares affected by the resolution. The resolution is effective when the statement

has been filed with the secretary of state.

Subd. 4. [SPECIFIC TERMS.] Without limiting the authority granted in this section, a corporation may issue shares of a class or series:

(a) Subject to the right of the corporation to redeem any of those shares at the price fixed for their redemption by the articles or by the board;

(b) Entitling the shareholders to cumulative, partially cumulative, or noncumulative distributions;

(c) Having preference over any class or series of shares for the payment of distributions of any or all kinds;

(d) Convertible into shares of any other class or any series of the same or another class; or

(e) Having full, partial, or no voting rights, except as provided in section 15.

Sec. 56. [302A.403] [SUBSCRIPTIONS FOR SHARES.]

Subdivision 1. [SIGNED WRITING.] A subscription for shares, whether made before or after the incorporation of a corporation, is not enforceable against the subscriber unless it is in writing and signed by the subscriber.

Subd. 2. [IRREVOCABLE PERIOD.] A subscription for shares of a corporation to be incorporated is irrevocable for a period of six months, unless the subscription agreement provides for, or unless all of the subscribers consent to, an earlier revocation.

Subd. 3. [PAYMENT; INSTALLMENTS.] A subscription for shares, whether made before or after the incorporation of a corporation, shall be paid in full at the time or times, or in the installments, if any, specified in the subscription agreement. In the absence of a provision in the subscription agreement specifying the time at which the subscription is to be paid, the subscription shall be paid at the time or times determined by the board, but a call made by the board for payment on subscriptions shall be uniform for all shares of the same class or for all shares of the same series.

Subd. 4. [METHOD OF COLLECTION; FORFEITURE; CANCELLATION OR SALE FOR ACCOUNT OF SUBSCRIBER.] (a) Unless otherwise

provided in the subscription agreement, in the event of default in the payment of an installment or call when due, the corporation may proceed to collect the amount due in the same manner as a debt due the corporation, or the board may declare a forfeiture of the subscription or cancel it in accordance with this subdivision.

(b) A forfeiture of the subscription shall not be declared against a subscriber unless the amount due remains unpaid for a period of 20 days after written notice of a demand for payment has been given. Upon forfeiture of the subscription, the shares subscribed for may be offered for sale by the corporation for a price in money equalling or exceeding the sum of the full balance owed by the delinquent subscriber plus the expenses incidental to the sale. The excess of net proceeds realized by the corporation over the sum of the amount owed by the delinquent subscriber plus the expenses incidental to the sale shall be paid to the delinquent subscriber or to a legal representative. The payment shall not exceed the amount actually paid by the delinquent subscriber.

(c) If, within 20 days after the corporation offers to sell the shares subscribed for by the delinquent subscriber, no prospective purchaser offers to purchase the shares for a money price sufficient to pay the sum of the full balance owed by the delinquent subscriber plus the expenses incidental to the sale, or if the corporation has refunded to the subscriber or a legal representative a portion of the subscription price actually paid that exceeds ten percent of the subscription price, the subscription may be cancelled and the shares subscribed for may be cancelled and restored to the status of authorized but unissued shares. The portion of the purchase price retained by the corporation that does not exceed ten percent of the subscription price is forfeited to the corporation.

Sec. 57. [302A.405] [CONSIDERATION FOR SHARES: VALUE AND PAYMENT; LIABILITY.]

Subdivision 1. [CONSIDERATION; PROCEDURE.] Subject to any restrictions in the articles:

(a) Shares may be issued for any consideration, including,

without limitation, money or other tangible or intangible property received by the corporation or to be received by the corporation under a written agreement, or services rendered to the corporation or to be rendered to the corporation under a written agreement, as authorized by resolution approved by the affirmative vote of a majority of the directors present, or approved by the affirmative vote of the holders of a majority of the voting shares present, valuing all nonmonetary consideration and establishing a price in money or other consideration, or a minimum price, or a general formula or method by which the price will be determined; and

(b) Upon authorization by resolution approved by the affirmative vote of a majority of the directors present or approved by the affirmative vote of the holders of a majority of the voting shares present, the corporation may, without consideration, issue its own shares in exchange for or in conversion of its outstanding shares, or issue its own shares pro rata to its shareholders or the shareholders of one or more classes or series, to effectuate share dividends or splits, including reverse share splits. No shares of a class or series shall be issued to the holders of shares of another class or series, unless the issuance either is expressly provided for in the articles or is approved at a meeting by the affirmative vote of the holders of a majority of all voting shares of the same class or series as the shares to be issued.

Subd. 2. [VALUE; LIABILITY.] The determinations of the board or the shareholders as to the amount or fair value or the fairness to the corporation of the consideration received or to be received by the corporation for its shares or the terms of payment, as well as the agreement to issue shares for that consideration, are presumed to be proper if they are made in good faith and on the basis of accounting methods, or a fair valuation or other method, reasonable in the circumstances. Directors or shareholders who are present and entitled to vote, and who, intentionally or without reasonable investigation, fail to vote against approving an issue of shares for a consideration that is unfair to the corporation, or overvalue property or

services received or to be received by the corporation as consideration for shares issued, are jointly and severally liable to the corporation for the benefit of the then shareholders who did not consent to and are damaged by the action, to the extent of the damages of those shareholders. A director or shareholder against whom a claim is asserted pursuant to this subdivision, except in case of knowing participation in a deliberate fraud, is entitled to contribution on an equitable basis from other directors or shareholders who are liable under this section.

Subd. 3. [PAYMENT; LIABILITY; CONTRIBUTION; STATUTE OF LIMITATIONS.] (a) A corporation shall issue only shares that are nonassessable or that are assessable but are issued with the unanimous consent of the shareholders. "Nonassessable" shares are shares for which the agreed consideration has been fully paid, delivered, or rendered to the corporation. Consideration in the form of a promissory note, a check, or a written agreement to transfer property or render services to a corporation in the future is fully paid when the note, check, or written agreement is delivered to the corporation.

(b) If shares are issued in violation of paragraph (a), the following persons are jointly and severally liable to the corporation for the difference between the agreed consideration for the shares and the consideration actually received by the corporation:

(1) A director or shareholder who was present and entitled to vote but who failed to vote against the issuance of the shares knowing of the violation;

(2) The person to whom the shares were issued; and

(3) A successor or transferee of the interest in the corporation of a person described in clause (1) or (2), including a purchaser of shares, a subsequent assignee, successor, or transferee, a pledgee, a holder of any other security interest in the assets of the corporation or shares granted by the person described in clause (1) or (2), or a legal representative of or for the person or estate of the person, which successor, transferee, purchaser, assignee, pledgee,

holder, or representative acquired the interest knowing of the violation.

(c) (1) A pledgee or holder of any other security interest in all or any shares that have been issued in violation of paragraph (a) is not liable under paragraph (b) if all those shares are surrendered to the corporation. The surrender does not impair any rights of the pledgee or holder of any other security interest against the pledgor or person granting the security interest.

(2) A pledgee, holder of any other security interest, or legal representative is liable under paragraph (b) only in that capacity. The liability of the person under paragraph (b) is limited to the assets held in that capacity for the person or estate of the person described in clause (1) or (2) of paragraph (b).

(3) Each person liable under paragraph (b) has a full right of contribution on an equitable basis from all other persons liable under paragraph (b) for the same transaction.

(4) An action shall not be maintained against a person under paragraph (b) unless commenced within two years from the date on which shares are issued in violation of paragraph (a).

Sec. 58. [302A.409] [RIGHTS TO PURCHASE.]

Subdivision 1. [DEFINITION.] "Right to purchase" means the right, however designated, pursuant to the terms of a security or agreement, entitling a person to subscribe to, purchase, or acquire securities of a corporation, whether by the exchange or conversion of other securities, or by the exercise of options, warrants, or other rights, or otherwise, but excluding preemptive rights.

Subd. 2. [TRANSFERABILITY; SEPARABILITY.] Rights to purchase may be either transferable or nontransferable and either separable or inseparable from other securities of the corporation, as the board may determine under this section.

Subd. 3. [ISSUANCE PERMITTED.] A corporation may issue rights to purchase if:

(a) Shares issuable upon the exercise of all outstanding rights to purchase, including the rights to purchase that are to

be issued, are authorized under section 7, subdivision 1, and are unissued; and

(b) The terms, provisions, and conditions of the rights to purchase to be issued, including the conversion basis or the price at which securities may be purchased or subscribed for, are fixed by the board, subject to any restrictions in the articles.

Subd. 4. [TERMS SET FORTH.] The instrument evidencing the right to purchase or, if no instrument exists, a transaction statement, shall set forth in full, summarize, or incorporate by reference all the terms, provisions, and conditions applicable to the right to purchase.

Sec. 59. [302A.413] [PREEMPTIVE RIGHTS.]

Subdivision 1. [PRESUMPTION; MODIFICATION.] Unless denied or limited in the articles or by the board pursuant to section 55, subdivision 2, clause (b), a shareholder of a corporation has the preemptive rights provided in this section.

Subd. 2. [DEFINITION.] A preemptive right is the right of a shareholder to acquire a certain fraction of the unissued securities or rights to purchase securities of a corporation before the corporation may offer them to other persons.

Subd. 3. [WHEN RIGHT ACCRUES.] A shareholder has a preemptive right whenever the corporation proposes to issue new or additional shares or rights to purchase shares of the same class or series as those held by the shareholder or new or additional securities other than shares, or rights to purchase securities other than shares, that are exchangeable for, convertible into, or carry a right to acquire new or additional shares of the same class or series as those held by the shareholder.

Subd. 4. [EXEMPTIONS.] A shareholder does not have a preemptive right to acquire securities or rights to purchase securities that are:

(a) Issued for a consideration other than money;

(b) Issued pursuant to a plan of merger or exchange;

(c) Issued pursuant to an employee or incentive benefit plan approved at a meeting by the affirmative vote of the

holders of a majority of all voting shares:

(d) Issued upon exercise of previously issued rights to purchase securities of the corporation;

(e) Issued pursuant to a public offering of the corporation's securities or rights to purchase securities. For purposes of this clause, "public offering" means an offering of the corporation's securities or rights to purchase securities to the general public; or

(f) Issued pursuant to a plan of reorganization approved by a court of competent jurisdiction pursuant to a statute of this state or of the United States.

Subd. 5. [FRACTION TO BE ACQUIRED.] The fraction of the new issue that each shareholder may acquire by exercise of a preemptive right is the ratio that the number of shares of that class or series owned by the shareholder before the new issue bears to the total number of shares of that class or series issued and outstanding before the new issue. For purposes of determining pursuant to this subdivision the total number of shares of a class or series issued and outstanding at a particular time, all shares of that class or series issuable upon a conversion or exchange or upon the exercise of rights to purchase are considered issued and outstanding at that time.

Subd. 6. [WAIVER.] A shareholder may waive a preemptive right in writing. The waiver is binding upon the shareholder whether or not consideration has been given for the waiver. Unless otherwise provided in the waiver, a waiver of preemptive rights is effective only for the proposed issuance described in the waiver.

Subd. 7. [NOTICE.] When proposing the issuance of securities with respect to which shareholders have preemptive rights under this section, the board shall cause notice to be given to each shareholder entitled to preemptive rights. The notice shall be given at least ten days before the date by which the shareholder must exercise a preemptive right and shall contain:

(a) The number or amount of securities with respect to which the shareholder has a preemptive right, and the method

used to determine that number or amount;

(b) The price and other terms and conditions upon which the shareholder may purchase them; and

(c) The time within which and the method by which the shareholder must exercise the right.

Subd. 6. [ISSUANCE TO OTHERS.] Securities that are subject to preemptive rights but not acquired by shareholders in the exercise of those rights may, for a period not exceeding one year after the date fixed by the board for the exercise of those preemptive rights, be issued to persons the board determines, at a price not less than, and on terms no more favorable to the purchaser than, those offered to the shareholders. Securities that are not issued during that one year period shall, at the expiration of the period, again become subject to preemptive rights of shareholders.

Sec. 60. [302A.417] [SHARE CERTIFICATES; ISSUANCE AND CONTENTS; UNCERTIFICATED SHARES.]

Subdivision 1. [CERTIFICATED; UNCERTIFICATED.] The shares of a corporation shall be either certificated shares or uncertificated shares. Each holder of certificated shares issued in accordance with section 57, subdivision 3, paragraph (a) is entitled to a certificate of shares.

Subd. 2. [CERTIFICATES; SIGNATURE REQUIRED.] Certificates shall be signed by an agent or officer authorized in the articles or bylaws to sign share certificates or, in the absence of an authorization, by an officer.

Subd. 3. [SIGNATURE VALID.] If a person signs or has a facsimile signature placed upon a certificate while an officer, transfer agent, or registrar of a corporation, the certificate may be issued by the corporation, even if the person has ceased to have that capacity before the certificate is issued, with the same effect as if the person had that capacity at the date of its issue.

Subd. 4. [FORM OF CERTIFICATE.] A certificate representing shares of a corporation shall contain on its face:

(a) The name of the corporation;

(b) A statement that the corporation is incorporated under

the laws of this state;

(c) The name of the person to whom it is issued; and

(d) The number and class of shares, and the designation of the series, if any, that the certificate represents.

Subd. 5. [LIMITATIONS SET FORTH.] A certificate representing shares issued by a corporation authorized to issue shares of more than one class or series shall set forth upon the face or back of the certificate, or shall state that the corporation will furnish to any shareholder upon request and without charge, a full statement of the designations, preferences, limitations, and relative rights of the shares of each class or series authorized to be issued, so far as they have been determined, and the authority of the board to determine the relative rights and preferences of subsequent classes or series.

Subd. 6. [PRIMA FACIE EVIDENCE.] A certificate signed as provided in subdivision 2 is prima facie evidence of the ownership of the shares referred to in the certificate.

Subd. 7. [UNCERTIFICATED SHARES.] Unless uncertificated shares are prohibited by the articles or bylaws, a resolution approved by the affirmative vote of a majority of the directors present may provide that some or all of any or all classes and series of its shares will be uncertificated shares. The resolution does not apply to shares represented by a certificate until the certificate is surrendered to the corporation. Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the new shareholder the information required by this section to be stated on certificates. Except as otherwise expressly provided by statute, the rights and obligations of the holders of certificated and uncertificated shares of the same class and series are identical.

Sec. 61. [302A.419] [LOST SHARE CERTIFICATES; REPLACEMENT.]

Subdivision 1. [ISSUANCE.] A new share certificate may be issued pursuant to Minnesota Statutes, Section 336.8-405 in place of one that is alleged to have been lost, stolen, or

destroyed.

Subd. 2. [NOT OVERISSUE.] The issuance of a new certificate under this section does not constitute an overissue of the shares it represents.

Sec. 62. [302A.423] [FRACTIONAL SHARES.]

Subdivision 1. [ISSUANCE; ALTERNATIVE EXCHANGE.] A corporation may issue fractions of a share originally or upon transfer. If it does not issue fractions of a share, it shall in connection with an original issuance of shares:

(a) Arrange for the disposition of fractional interests by those entitled to them;

(b) Pay in money the fair value of fractions of a share as of the time when persons entitled to receive the fractions are determined; or

(c) Issue scrip or warrants in registered or bearer form that entitle the holder to receive a certificate for a full share upon the surrender of the scrip or warrants aggregating a full share.

Subd. 2. [RESTRICTIONS; RIGHTS.] A corporation shall not pay money for fractional shares if that action would result in the cancellation of more than 20 percent of the outstanding shares of a class. A determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud. A certificate or a transaction statement for a fractional share does, but scrip or warrants do not unless they provide otherwise, entitle the shareholder to exercise voting rights or to receive distributions. The board may cause scrip or warrants to be issued subject to the condition that they become void if not exchanged for full shares before a specified date, or that the shares for which scrip or warrants are exchangeable may be sold by the corporation and the proceeds distributed to the holder of the scrip or warrants, or to any other condition or set of conditions the board may impose.

Sec. 63. [302A.425] [LIABILITY OF SUBSCRIBERS AND SHAREHOLDERS WITH RESPECT TO SHARES.]

A subscriber for shares or a shareholder of a corporation is under no obligation to the corporation or its creditors with

respect to the shares subscribed for or owned, except to pay to the corporation the full consideration for which the shares are issued or to be issued.

Sec. 64. [302A.429] [RESTRICTION ON TRANSFER OR REGISTRATION OF SECURITIES.]

Subdivision 1. [HOW IMPOSED.] A restriction on the transfer or registration of transfer of securities of a corporation may be imposed in the articles, in the bylaws, by a resolution adopted by the shareholders, or by an agreement among or other written action by a number of shareholders or holders of other securities or among them and the corporation. A restriction is not binding with respect to securities issued prior to the adoption of the restriction, unless the holders of those securities are parties to the agreement or voted in favor of the restriction.

Subd. 2. [RESTRICTIONS PERMITTED.] A written restriction on the transfer or registration of transfer of securities of a corporation that is not manifestly unreasonable under the circumstances and is noted conspicuously on the face or back of the certificate or transaction statement may be enforced against the holder of the restricted securities or a successor or transferee of the holder, including a pledgee or a legal representative. Unless noted conspicuously on the face or back of the certificate or transaction statement, a restriction, even though permitted by this section, is ineffective against a person without knowledge of the restriction.

Sec. 65. [302A.431] [REGULAR MEETINGS OF SHAREHOLDERS.]

Subdivision 1. [FREQUENCY.] Regular meetings of shareholders may be held on an annual or other less frequent periodic basis, but need not be held unless required by the articles or bylaws or by subdivision 2.

Subd. 2. [DEMAND BY SHAREHOLDER.] If a regular meeting of shareholders has not been held during the immediately preceding 15 months, a shareholder or shareholders holding one percent or more of all voting shares may demand a regular meeting of shareholders by written notice of demand given to the chief executive officer or the chief financial officer of the

corporation. Within 30 days after receipt of the demand by one of those officers, the board shall cause a regular meeting of shareholders to be called and held on notice no later than 90 days after receipt of the demand, all at the expense of the corporation. If the board fails to cause a regular meeting to be called and held as required by this subdivision, the shareholder or shareholders making the demand may call the meeting by giving notice as required by section 67, all at the expense of the corporation.

Subd. 3. [TIME; PLACE.] A regular meeting, if any, shall be held on the day or date and at the time and place fixed by, or in a manner authorized by, the articles or bylaws, except that a meeting called by or at the demand of a shareholder pursuant to subdivision 2 shall be held in the county where the principal executive office of the corporation is located.

Subd. 4. [ELECTIONS REQUIRED; OTHER BUSINESS.] At each regular meeting of shareholders there shall be an election of qualified successors for directors who serve for an indefinite term or whose terms have expired or are due to expire within six months after the date of the meeting. No other particular business is required to be transacted at a regular meeting. Any business appropriate for action by the shareholders may be transacted at a regular meeting.

Sec. 66. [302A.433] [SPECIAL MEETINGS OF SHAREHOLDERS.]

Subdivision 1. [WHO MAY CALL.] Special meetings of the shareholders may be called for any purpose or purposes at any time, by:

(a) The chief executive officer;

(b) The chief financial officer;

(c) Two or more directors;

(d) A person authorized in the articles or bylaws to call special meetings; or

(e) A shareholder or shareholders holding ten percent or more of the voting shares.

Subd. 2. [DEMAND BY SHAREHOLDERS.] A shareholder or shareholders holding ten percent or more of the voting shares may demand a special meeting of shareholders by written notice

of demand given to the chief executive officer or chief financial officer of the corporation and containing the purposes of the meeting. Within 30 days after receipt of the demand by one of those officers, the board shall cause a special meeting of shareholders to be called and held on notice no later than 90 days after receipt of the demand, all at the expense of the corporation. If the board fails to cause a special meeting to be called and held as required by this subdivision, the shareholder or shareholders making the demand may call the meeting by giving notice as required by section 67, all at the expense of the corporation.

Subd. 3. [TIME; PLACE.] Special meetings shall be held on the date and at the time and place fixed by the chief executive officer, the board, or a person authorized by the articles or bylaws to call a meeting, except that a special meeting called by or at the demand of a shareholder or shareholders pursuant to subdivision 2 shall be held in the county where the principal executive office is located.

Subd. 4. [BUSINESS LIMITED.] The business transacted at a special meeting is limited to the purposes stated in the notice of the meeting. Any business transacted at a special meeting that is not included in those stated purposes is voidable by or on behalf of the corporation, unless all of the shareholders have waived notice of the meeting in accordance with section 67, subdivision 4.

Sec. 67. [302A.435] [NOTICE.]

Subdivision 1. [TO WHOM GIVEN.] Notice of all meetings of shareholders shall be given to every holder of voting shares, except where the meeting is an adjourned meeting and the date, time, and place of the meeting were announced at the time of adjournment.

Subd. 2. [WHEN GIVEN.] The notice shall be given at least ten days before the date of the meeting, or a shorter time provided in the articles or bylaws, and not more than 60 days before the date of the meeting.

Subd. 3. [CONTENTS.] The notice shall contain the date, time, and place of the meeting, and any other information

required by sections 1 to 125. In the case of a special meeting, the notice shall contain a statement of the purposes of the meeting. The notice may also contain any other information required by the articles or bylaws or deemed necessary or desirable by the board or by any other person or persons calling the meeting.

Subd. 4. [WAIVER; OBJECTIONS.] A shareholder may waive notice of a meeting of shareholders. A waiver of notice by a shareholder entitled to notice is effective whether given before, at, or after the meeting, and whether given in writing, orally, or by attendance. Attendance by a shareholder at a meeting is a waiver of notice of that meeting, except where the shareholder objects at the beginning of the meeting to the transaction of business because the meeting is not lawfully called or convened, or objects before a vote on an item of business because the item may not lawfully be considered at that meeting and does not participate in the consideration of the item at that meeting.

Sec. 68. [302A.437] [ACT OF THE SHAREHOLDERS.]

Subdivision 1. [MAJORITY REQUIRED.] The shareholders shall take action by the affirmative vote of the holders of a majority of the voting shares present, except where sections 1 to 125 or the articles require a larger proportion or number. If the articles require a larger proportion or number than is required by sections 1 to 125 for a particular action, the articles control.

Subd. 2. [VOTING BY CLASS.] In any case where a class or series of shares is entitled by sections 1 to 125, the articles, the bylaws, or the terms of the shares to vote as a class or series, the matter being voted upon must also receive the affirmative vote of the holders of the same proportion of the shares of that class or series as is required pursuant to subdivision 1.

Sec. 69. [302A.441] [ACTION WITHOUT A MEETING.]

An action required or permitted to be taken at a meeting of the shareholders may be taken without a meeting by written action signed by all of the shareholders entitled to vote on

that action. The written action is effective when it has been signed by all of those shareholders, unless a different effective time is provided in the written action.

Sec. 70. [302A.443] [QUORUM.]

The holders of a majority of the shares entitled to vote at a meeting present in person or by proxy at the meeting are a quorum for the transaction of business, unless a larger or smaller proportion or number is provided in the articles or bylaws. If a quorum is present when a duly called or held meeting is convened, the shareholders present may continue to transact business until adjournment, even though the withdrawal of a number of shareholders originally present leaves less than the proportion or number otherwise required for a quorum.

Sec. 71. [302A.445] [VOTING RIGHTS.]

Subdivision 1. [DETERMINATION.] The board may fix a date not more than 50 days, or a shorter time period provided in the articles or bylaws, before the date of a meeting of shareholders as the date for the determination of the holders of voting shares entitled to notice of and to vote at the meeting. When a date is so fixed, only shareholders on that date are entitled to notice of and permitted to vote at that meeting of shareholders.

Subd. 2. [CERTIFICATION OF BENEFICIAL OWNER.] A resolution approved by the affirmative vote of a majority of the directors present may establish procedure whereby a shareholder may certify in writing to the corporation that all or a portion of the shares registered in the name of the shareholder are held for the account of one or more beneficial owners. Upon receipt by the corporation of the writing, the persons specified as beneficial owners, rather than the actual shareholder, are deemed the shareholders for the purposes specified in the writing.

Subd. 3. [ONE VOTE PER SHARE.] Unless otherwise provided in the articles or bylaws or in the terms of the shares, a shareholder has one vote for each share held.

Subd. 4. [NON-SHAREHOLDERS.] The articles may give or prescribe the manner of giving a creditor, security holder, or other person a right to vote under this section.

Subd. 5. [JOINTLY OWNED SHARES.] Shares owned by two or more shareholders may be voted by any one of them unless the corporation receives written notice from any one of them denying the authority of that person to vote those shares.

Subd. 6. [MANNER OF VOTING; PRESUMPTION.] Except as provided in subdivision 5, a holder of voting shares may vote any portion of the shares in any way the shareholder chooses. If a shareholder votes without designating the proportion or number of shares voted in a particular way, the shareholder is deemed to have voted all of the shares in that way.

Sec. 72. [302A.447] [VOTING OF SHARES BY ORGANIZATIONS AND LEGAL REPRESENTATIVES.]

Subdivision 1. [SHARES HELD BY OTHER CORPORATION.] Shares of a corporation registered in the name of another domestic or foreign corporation may be voted by the chief executive officer or another legal representative of that corporation.

Subd. 2. [SHARES HELD BY SUBSIDIARY.] Except as provided in subdivision 3, shares of a corporation registered in the name of a subsidiary are not entitled to vote on any matter.

Subd. 3. [SHARES CONTROLLED IN FIDUCIARY CAPACITY.] Shares of a corporation in the name of or under the control of the corporation or a subsidiary in a fiduciary capacity are not entitled to vote on any matter, except to the extent that the settlor or beneficial owner possesses and exercises a right to vote or gives the corporation binding instructions on how to vote the shares.

Subd. 4. [VOTING BY CERTAIN REPRESENTATIVES.] Shares under the control of a person in a capacity as a personal representative, an administrator, executor, guardian, conservator, or attorney-in-fact may be voted by the person, either in person or by proxy, without registration of those shares in the name of the person. Shares registered in the name of a trustee of a trust or in the name of a custodian may be voted by the person, either in person or by proxy, but a trustee of a trust or a custodian shall not vote shares held by the person unless they are registered in the name of the person.

Subd. 5. [VOTING BY TRUSTEE IN BANKRUPTCY OR RECEIVER.]

Shares registered in the name of a trustee in bankruptcy or a receiver may be voted by the trustee or receiver either in person or by proxy. Shares under the control of a trustee in bankruptcy or a receiver may be voted by the trustee or receiver without registering the shares in the name of the trustee or receiver, if authority to do so is contained in an appropriate order of the court by which the trustee or receiver was appointed.

Subd. 6. [SHARES HELD BY OTHER ORGANIZATIONS.] Shares registered in the name of an organization not described in subdivisions 1 to 5 may be voted either in person or by proxy by the legal representative of that organization.

Subd. 7. [PLEDGED SHARES.] A shareholder whose shares are pledged may vote those shares until the shares are registered in the name of the pledgee.

Sec. 73. [302A.449] [PROXIES.]

Subdivision 1. AUTHORIZATION.] A shareholder may cast or authorize the casting of a vote by filing a written appointment of a proxy with an officer of the corporation at or before the meeting at which the appointment is to be effective. An appointment of a proxy for shares held jointly by two or more shareholders is valid if signed by any one of them, unless the corporation receives from any one of those shareholders either written notice denying the authority of that person to appoint a proxy or appointing a different proxy.

Subd. 2. [DURATION.] The appointment of a proxy is valid for 11 months, unless a longer period is expressly provided in the appointment. No appointment is irrevocable unless the appointment is coupled with an interest in the shares or in the corporation.

Subd. 3. [TERMINATION.] An appointment may be terminated at will, unless the appointment is coupled with an interest, in which case it shall not be terminated except in accordance with the terms of an agreement, if any, between the parties to the appointment. Termination may be made by filing written notice of the termination of the appointment with an officer of the corporation, or by filing a new written appointment of a proxy

with an officer of the corporation. Termination in either manner revokes all prior proxy appointments and is effective when filed with an officer of the corporation.

Subd. 4. [REVOCATION BY DEATH, INCAPACITY.] The death or incapacity of a person appointing a proxy does not revoke the authority of the proxy, unless written notice of the death or incapacity is received by an officer of the corporation before the proxy exercises the authority under that appointment.

Subd. 5. [MULTIPLE PROXIES.] Unless the appointment specifically provides otherwise, if two or more persons are appointed as proxies for a shareholder:

(a) Any one of them may vote the shares on each item of business in accordance with specific instructions contained in the appointment; and

(b) If no specific instructions are contained in the appointment with respect to voting the shares on a particular item of business, the shares shall be voted as a majority of the proxies determine. If the proxies are equally divided, the shares shall not be voted.

Subd. 6. [VOTE OF PROXY ACCEPTED; LIABILITY.] Unless the appointment of a proxy contains a restriction, limitation, or specific reservation of authority, the corporation may accept a vote or action taken by a person named in the appointment. The vote of a proxy is final, binding, and not subject to challenge, but the proxy is liable to the shareholder or beneficial owner for damages resulting from a failure to exercise the proxy or from an exercise of the proxy in violation of the authority granted in the appointment.

Sec. 74. [302A.453] [VOTING TRUSTS.]

Subdivision 1. [AUTHORIZATION; PERIOD; TERMINATION.] Shares in a corporation may be transferred to a trustee pursuant to written agreement, for the purpose of conferring on the trustee the right to vote and otherwise represent the beneficial owner of those shares for a period not exceeding 15 years, except that if the agreement is made in connection with an indebtedness of the corporation, the voting trust may extend until the indebtedness is discharged. Unless otherwise

specified in the agreement, the voting trust may be terminated at any time by the beneficial owners of a majority of the shares held by the trustee. A copy of the agreement shall be filed with the corporation.

Subd. 2. [VOTING BY TRUSTEES.] Unless otherwise provided in the trust agreement, if there are two or more trustees, the manner of voting is determined as provided in section 71, subdivision 5.

Sec. 75. [302A.455] [SHAREHOLDER VOTING AGREEMENTS.]

A written agreement among any or all shareholders, or any or all subscribers for shares in the event no shares have been issued, relating to the voting of their shares is valid and specifically enforceable by and against the parties to the agreement. The agreement may override the provisions of section 73 regarding proxies and is not subject to the provisions of section 74 regarding voting trusts.

Sec. 76. [302A.457] [SHAREHOLDER CONTROL AGREEMENTS.]

Subdivision 1. [AUTHORIZED.] The shareholders of a corporation, or the subscribers for its shares in the event no shares have been issued, may enter into a written agreement relating to the control of any phase of the business and affairs of the corporation, its liquidation and dissolution, or the relations among shareholders of or subscribers to shares of the corporation.

Subd. 2. [METHOD OF APPROVAL; ENFORCEABILITY; COPIES.] (a) A written agreement among persons described in subdivision 1 that relates to the control of the liquidation and dissolution of the corporation, the relations among them, or any phase of the business and affairs of the corporation, including, without limitation, the management of its business, the declaration and payment of distributions, the election of directors or officers, the employment of shareholders by the corporation, or the arbitration of disputes, is valid and specifically enforceable by and against the parties to it, if the agreement is signed by all the shareholders of the corporation, whether or not the shareholders all have voting shares, or by all the subscribers for shares in the event no shares have been issued at the time

the agreement is signed.

(b) The agreement is binding upon and enforceable against only the parties to the agreement and other persons having knowledge of the existence of the agreement. A copy of the agreement shall be filed with the corporation. The existence and location of a copy of the agreement shall be noted conspicuously on the face or back of each certificate for shares issued by the corporation and on each transaction statement.

(c) A shareholder, a beneficial owner of shares, or another person having a security interest in shares has the right upon written demand to obtain a copy of the agreement from the corporation at the expense of the corporation.

Subd. 3. [LIABILITY.] The effect of an agreement authorized by this section is to relieve the board and the director or directors in their capacities as directors of, and to impose upon the parties to the agreement, the liability for acts or omissions imposed by law upon directors to the extent that and so long as the discretion or powers of the directors in the management of the business and affairs of the corporation are exercised by the shareholders under a provision in the agreement. A shareholder is not liable pursuant to this subdivision by virtue of a shareholder vote, if the shareholder had no right to vote on the action.

Subd. 4. [OTHER AGREEMENTS.] This section does not apply to, limit, or restrict agreements otherwise valid, nor is the procedure set forth in this section the exclusive method of agreement among shareholders or between the shareholders and the corporation with respect to any of the matters described in this section.

Sec. 77. [302A.461] [BOOKS AND RECORDS; INSPECTION.]

Subdivision 1. [SHARE REGISTER; DATES OF ISSUANCE.] (a) A corporation shall keep at its principal executive office, or at another place or places within the United States determined by the board, a share register not more than one year old, containing the names and addresses of the shareholders and the number and classes of shares held by each shareholder.

(b) A corporation shall also keep, at its principal

executive office, or at another place or places within the United States determined by the board, a record of the dates on which certificates or transaction statements representing shares were issued.

Subd. 2. [OTHER DOCUMENTS REQUIRED.] A corporation shall keep at its principal executive office, or, if its principal executive office is outside of this state, shall make available at its registered office within ten days after receipt by an officer of the corporation of a written demand for them made by a person described in subdivision 4, originals or copies of:

(a) Records of all proceedings of shareholders for the last three years;

(b) Records of all proceedings of the board for the last three years;

(c) Its articles and all amendments currently in effect;

(d) Its bylaws and all amendments currently in effect;

(e) Financial statements required by section 78 and the financial statement for the most recent interim period prepared in the course of the operation of the corporation for distribution to the shareholders or to a governmental agency as a matter of public record;

(f) Reports made to shareholders generally within the last three years;

(g) A statement of the names and usual business addresses of its directors and principal officers;

(h) Voting trust agreements described in section 71; and

(i) Shareholder control agreements described in section 76.

Subd. 3. [FINANCIAL RECORDS.] A corporation shall keep appropriate and complete financial records.

Subd. 4. [RIGHT TO INSPECT.] (a) A shareholder or a holder of a voting trust certificate has an absolute right, upon written demand, to examine and copy, in person or by a legal representative, at any reasonable time:

(1) The share register; and

(2) All documents referred to in subdivision 2.

(b) A shareholder or a holder of a voting trust certificate has a right, upon written demand, to examine and copy, in person

or by a legal representative, other corporate records at any reasonable time only if the shareholder or holder of a voting trust certificate demonstrates a proper purpose for the examination. A "proper purpose" is one reasonably related to the person's interest as a shareholder or holder of a voting trust certificate of the corporation.

Subd. 5. [COST OF COPIES.] Copies of all documents referred to in subdivision 2 shall be furnished at the expense of the corporation. A copy of the most recently generated share register shall be furnished at the expense of the corporation if the requesting party shows a proper purpose. In all other cases, the corporation may charge the requesting party a reasonable fee to cover the expenses of providing the copy.

Subd. 6. [COMPUTERIZED RECORDS.] The records maintained by a corporation, including its share register, financial records, and minute books, may utilize any information storage technique, including, for example, punched holes, printed or magnetized spots, or micro-images, even though that makes them illegible visually, if the records can be converted, by machine and within a reasonable time, into a form that is legible visually and whose contents are assembled by related subject matter to permit convenient use by people in the normal course of business. A corporation shall convert any of the records referred to in subdivision 4 upon the request of a person entitled to inspect them, and the expense of the conversion shall be borne by the person who bears the expense of copying pursuant to subdivision 5. A copy of the conversion is admissible in evidence, and shall be accepted for all other purposes, to the same extent as the existing or original records would be if they were legible visually.

Sec. 78. [302A.463] [FINANCIAL STATEMENTS.]

A corporation shall furnish to its shareholders annual financial statements, including at least a balance sheet as of the end of each fiscal year and a statement of income for the fiscal year, which shall be prepared on the basis of accounting methods reasonable in the circumstances and may be consolidated statements of the corporation and one or more of its

subsidiaries. The financial statements shall be distributed by the corporation to each of its shareholders within 120 days after the close of each fiscal year, unless the financial statements are audited by a public accountant, in which case the statements shall be distributed as soon as the audited financial statements are available. Each shareholder or holder of a voting trust certificate to whom a copy of the most recent annual financial statements has not previously been distributed shall be furnished a copy by the corporation upon written request. In the case of statements audited by a public accountant, each copy shall be accompanied by a report setting forth the opinion of the accountant on the statements; in other cases, each copy shall be accompanied by a statement of the chief executive officer or other person in charge of the corporation's financial records stating the reasonable belief of the person that the financial statements were prepared in accordance with accounting methods reasonable in the circumstances and describing the basis of presentation and any respects in which the financial statements were not prepared on a basis consistent with those prepared for the previous year.

Sec. 79. [302A.467] [EQUITABLE REMEDIES.]

If a corporation or an officer or director of the corporation violates a provision of sections 1 to 125, a court in this state may grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to a complaining shareholder.

Sec. 80. [302A.471] [RIGHTS OF DISSENTING SHAREHOLDERS.]

Subdivision 1. [ACTIONS CREATING RIGHTS.] A shareholder of a corporation may dissent from, and obtain payment for the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(a) An amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it:

(1) Alters or abolishes a preferential right of the shares;

(2) Creates, alters, or abolishes a right in respect of the redemption of the shares, including a provision respecting a

sinking fund for the redemption or repurchase of the shares;

(3) Alters or abolishes a preemptive right of the holder of the shares to acquire shares, securities other than shares, or rights to purchase shares or securities other than shares;

(4) Excludes or limits the right of a shareholder to vote on a matter, or to cumulate votes, except as the right may be limited by dilution through the issuance of securities with similar voting rights;

(b) A sale, lease, transfer, or other disposition of all or substantially all of the property and assets of the corporation not made in the usual or regular course of its business, but not including a disposition in dissolution described in section 102, subdivision 2, or a disposition pursuant to an order of a court, or a disposition for cash on terms requiring that all or substantially all of the net proceeds of disposition be distributed to the shareholders in accordance with their respective interests within one year after the date of disposition;

(c) A plan of merger to which the corporation is a party, except as provided in subdivision 3;

(d) A plan of exchange pursuant to which the shares of the corporation are to be acquired; or

(e) Any other corporate action taken pursuant to a shareholder vote with respect to which the articles, the bylaws, or a resolution approved by the board directs that dissenting shareholders may obtain payment for their shares.

Subd. 2. [BENEFICIAL OWNERS.] (a) A shareholder shall not assert dissenters' rights as to less than all of the shares registered in the name of the shareholder, unless the shareholder dissents with respect to all the shares that are beneficially owned by another person but registered in the name of the shareholder and discloses the name and address of each beneficial owner on whose behalf the shareholder dissents. In that event, the rights of the dissenter shall be determined as if the shares as to which the shareholder has dissented and the other shares were registered in the names of different shareholders.

(b) A beneficial owner of shares who is not the shareholder may assert dissenters' rights with respect to shares held on behalf of the beneficial owner, and shall be treated as a dissenting shareholder under the terms of this section and section 81, if the beneficial owner submits to the corporation at the time of or before the assertion of the rights a written consent of the shareholder.

Subd. 3. [RIGHTS NOT TO APPLY.] The right to obtain payment under this section does not apply to the shareholders of the surviving corporation in a merger or of the acquiring corporation in an exchange, if a vote of the shareholders of the corporation is not necessary to authorize the merger or exchange.

Subd. 4. [OTHER RIGHTS.] The shareholders of a corporation who have a right under this section to obtain payment for their shares do not have a right at law or in equity to have a corporate action described in subdivision 1 set aside or rescinded, except when the corporate action is fraudulent with regard to the complaining shareholder or the corporation.

Sec. 81. [302A.473] [PROCEDURES FOR ASSERTING DISSENTERS' RIGHTS.]

Subdivision 1. [DEFINITIONS.] (a) For purposes of this section, the terms defined in this subdivision have the meanings given them.

(b) "Corporation" means the issuer of the shares held by a dissenter before the corporate action referred to in section 80, subdivision 1 or the successor by merger of that issuer.

(c) "Fair value of the shares" means the value of the shares of a corporation immediately before the effective date of the corporate action referred to in section 80, subdivision 1.

(d) "Interest" means interest from the effective date of the corporate action referred to in section 80, subdivision 1 until the date of payment, calculated either at the rate currently paid by the corporation on its most recent unsecured commercial borrowing, or, if none, at a rate that is fair and equitable under all the circumstances.

Subd. 2. [NOTICE OF ACTION.] If a corporation calls a shareholder meeting at which any action described in section 80,

subdivision 1 is to be voted upon, the notice of the meeting shall inform each shareholder of the right to dissent and shall include a copy of section 80 and this section and a brief description of the procedure to be followed under these sections.

Subd. 3. [NOTICE OF DISSENT.] If the proposed action must be approved by the shareholders, a shareholder who wishes to exercise dissenters' rights must file with the corporation before the vote on the proposed action a written notice of intent to demand the fair value of the shares owned by the shareholder and must not vote the shares in favor of the proposed action.

Subd. 4. [NOTICE OF PROCEDURE; DEPOSIT OF SHARES.] (a) After the proposed action has been approved by the board and, if necessary, the shareholders, the corporation shall send to all shareholders who have complied with subdivision 3 and to all shareholders entitled to dissent if no shareholder vote was required, a notice that contains:

(1) The address to which a demand for payment and certificates of certificated shares must be sent in order to obtain payment and the date by which they must be received;

(2) Any restrictions on transfer of uncertificated shares that will apply after the demand for payment is received;

(3) A form to be used to certify the date on which the shareholder, or the beneficial owner on whose behalf the shareholder dissents, acquired the shares or an interest in them and to demand payment; and

(4) A copy of section 80 and this section and a brief description of the procedures to be followed under these sections.

(b) In order to receive the fair value of the shares, a dissenting shareholder must demand payment and deposit certificated shares or comply with any restrictions on transfer of uncertificated shares within 30 days after the notice was given, but the dissenter retains all other rights of a shareholder until the proposed action takes effect.

Subd. 5. [PAYMENT; RETURN OF SHARES.] (a) After the corporate action takes effect, or after the corporation receives

a valid demand for payment, whichever is later, the corporation shall remit to each dissenting shareholder who has complied with subdivisions 3 and 4 the amount the corporation estimates to be the fair value of the shares, with interest, if any, accompanied by:

(1) The corporation's closing balance sheet and statement of income for a fiscal year ending not more than 16 months before the effective date of the corporate action, together with the latest available interim financial statements;

(2) An estimate by the corporation of the fair value of the shares and a brief description of the method used to reach the estimate; and

(3) A copy of section 80 and this section, and a brief description of the procedure to be followed in demanding supplemental payment.

(b) The corporation may withhold the remittance described in paragraph (a) from a person who was not a shareholder on the date the action dissented from was first announced to the public or who is dissenting on behalf of a person who was not a beneficial owner on that date. If the dissenter has complied with subdivisions 3 and 4, the corporation shall forward to the dissenter the materials described in paragraph (a), a statement of the reason for withholding the remittance, and an offer to pay to the dissenter the amount listed in the materials if the dissenter agrees to accept that amount in full satisfaction. The dissenter may decline the offer and demand payment under subdivision 6. Failure to do so entitles the dissenter only to the amount offered. If the dissenter makes demand, subdivisions 7 and 8 apply.

(c) If the corporation fails to remit payment within 60 days of the deposit of certificates or the imposition of transfer restrictions on uncertificated shares, it shall return all deposited certificates and cancel all transfer restrictions. However, the corporation may again give notice under subdivision 4 and require deposit or restrict transfer at a later time.

Subd. 6. [SUPPLEMENTAL PAYMENT: DEMAND.] If a dissenter

believes that the amount remitted under subdivision 5 is less than the fair value of the shares with interest, if any, the dissenter may give written notice to the corporation of the dissenter's own estimate of the fair value of the shares, with interest, if any, within 30 days after the corporation mails the remittance under subdivision 5 and demand payment of the difference. Otherwise, a dissenter is entitled only to the amount remitted by the corporation.

Subd. 7. [PETITION; DETERMINATION.] If the corporation receives a demand under subdivision 6, it shall, within 60 days after receiving the demand, either pay to the dissenter the amount demanded or agreed to by the dissenter after discussion with the corporation or file in court a petition requesting that the court determine the fair value of the shares, with interest, if any. The petition shall be filed in the county in which the registered office of the corporation is located, except that a surviving foreign corporation that receives a demand relating to the shares of a constituent domestic corporation shall file the petition in the county in this state in which the last registered office of the constituent corporation was located. The petition shall name as parties all dissenters who have demanded payment under subdivision 6 and who have not reached agreement with the corporation. The jurisdiction of the court is plenary and exclusive. The court may appoint appraisers, with powers and authorities the court deems proper, to receive evidence on and recommend the amount of the fair value of the shares. The court shall determine the fair value of the shares, taking into account any and all factors the court finds relevant, computed by any method or combination of methods that the court, in its discretion, sees fit to use, whether or not used by the corporation or by a dissenter. The fair value of the shares as determined by the court is binding on all shareholders, wherever located. A dissenter is entitled to judgment for the amount by which the fair value of the shares as determined by the court exceeds the anount, if any, remitted under subdivision 5.

Subd. 8. [COSTS; FEES; EXPENSES.] (a) The court shall

determine the costs and expenses of a proceeding under subdivision 7, including the reasonable expenses and compensation of any appraisers appointed by the court, and shall assess those costs and expenses against the corporation, except that the court may assess part or all of those costs and expenses against a dissenter whose action in demanding payment under subdivision 6 is found to be arbitrary, vexatious or not in good faith.

(b) If the court finds that the corporation has failed to comply substantially with this section, the court may assess all fees and expenses of any experts or attorneys as the court deems equitable. These fees and expenses may also be assessed against a person who has acted arbitrarily, vexatiously, or not in good faith in bringing the proceeding, and may be awarded to a party injured by those actions.

(c) The court may award, in its discretion, fees and expenses to an attorney for the dissenters out of the amount awarded to the dissenters, if any.

LOANS; OBLIGATIONS; DISTRIBUTIONS

Sec. 82. [302A.501] [LOANS; GUARANTEES; SURETYSHIP.]

Subdivision 1. [PREREQUISITES.] A corporation may lend money to, guarantee an obligation of, become a surety for, or otherwise financially assist a person, if the transaction, or a class of transactions to which the transaction belongs, is approved by the affirmative vote of a majority of the directors present and:

(a) Is in the usual and regular course of business of the corporation;

(b) Is with, or for the benefit of, a related corporation, an organization in which the corporation has a financial interest, an organization with which the corporation has a business relationship, or an organization to which the corporation has the power to make donations;

(c) Is with, or for the benefit of, an officer or other employee of the corporation or a subsidiary, including an officer or employee who is a director of the corporation or a subsidiary, and may reasonably be expected, in the judgment of

the board, to benefit the corporation; or

(d) Has been approved by the affirmative vote of the holders of two-thirds of the outstanding shares.

Subd. 2. [INTEREST; SECURITY.] A loan, guaranty, surety contract, or other financial assistance under subdivision 1 may be with or without interest and may be unsecured or may be secured in any manner, including, without limitation, a grant of a security interest in shares of the corporation.

Sec. 63. [302A.505] [ADVANCES.]

A corporation may, without a vote of the directors, advance money to its directors, officers, or employees to cover expenses that can reasonably be anticipated to be incurred by them in the performance of their duties and for which they would be entitled to reimbursement in the absence of an advance.

Sec. 64. [302A.521] [INDEMNIFICATION.]

Subdivision 1. [DEFINITIONS.] (a) For purposes of this section, the terms defined in this subdivision have the meanings given them.

(b) "Corporation" includes a domestic or foreign corporation that was the predecessor of the corporation referred to in this section in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(c) "Official capacity" means (1) with respect to a director, the position of director in a corporation, (2) with respect to a person other than a director, the elective or appointive office or position held by an officer, member of a committee of the board, or the employment or agency relationship undertaken by an employee or agent of the corporation, and (3) with respect to a director, officer, employee, or agent of the corporation who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation or whose duties in that position involve or involved service as a director, officer, partner, trustee, or agent of another organization or employee benefit plan, the position of that person as a director, officer, partner, trustee, employee, or agent, as the case may be, of the other organization or

employee benefit plan.

(d) "Proceeding" means a threatened, pending, or completed civil, criminal, administrative, arbitration, or investigative proceeding, including a proceeding by or in the right of the corporation.

(e) "Special legal counsel" means counsel who has not represented the corporation or a related corporation, or a director, officer, employee, or agent whose indemnification is in issue.

Subd. 2. [INDEMNIFICATION MANDATORY; STANDARD.] (a) Subject to the provisions of subdivision 4, a corporation shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorneys' fees and disbursements, incurred by the person in connection with the proceeding, if, with respect to the acts or omissions of the person complained of in the proceeding, the person:

(1) Has not been indemnified by another organization or employee benefit plan for the same expenses with respect to the same acts or omissions;

(2) Conducted himself in good faith;

(3) Received no improper personal benefit and section 45, if applicable, has been satisfied;

(4) In the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful; and

(5) In the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (1) or (2), reasonably believed that the conduct was in the best interests of the corporation, or in the case of acts or omissions occurring in the official capacity described in subdivision 1, paragraph (c), clause (3), reasonably believed that the conduct was not opposed to the best interests of the corporation. If the person's acts or omissions complained of in the proceeding relate to conduct as a director, officer,

trustee, employee, or agent of an employee benefit plan, the conduct is not considered to be opposed to the best interests of the corporation if the person reasonably believed that the conduct was in the best interests of the participants or beneficiaries of the employee benefit plan.

(b) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent does not, of itself, establish that the person did not meet the criteria set forth in this subdivision.

Subd. 3. [ADVANCES.] Subject to the provisions of subdivision 4, if a person is made or threatened to be made a party to a proceeding, the person is entitled, upon written request to the corporation, to payment or reimbursement by the corporation of reasonable expenses, including attorneys' fees and disbursements, incurred by the person in advance of the final disposition of the proceeding, (a) upon receipt by the corporation of a written affirmation by the person of a good faith belief that the criteria for indemnification set forth in subdivision 2 have been satisfied and a written undertaking by the person to repay all amounts so paid or reimbursed by the corporation, if it is ultimately determined that the criteria for indemnification have not been satisfied, and (b) after a determination that the facts then known to those making the determination would not preclude indemnification under this section. The written undertaking required by clause (a) is an unlimited general obligation of the person making it, but need not be secured and shall be accepted without reference to financial ability to make the repayment.

Subd. 4. [PROHIBITION OR LIMIT ON INDEMNIFICATION OR ADVANCES.] The articles or bylaws either may prohibit indemnification or advances of expenses otherwise required by this section or may impose conditions on indemnification or advances of expenses in addition to the conditions contained in subdivisions 2 and 3 including, without limitation, monetary limits on indemnification or advances of expenses, if the conditions apply equally to all persons or to all persons within a given class.

Subd. 5. [REIMBURSEMENT TO WITNESSES.] This section does not require, or limit the ability of, a corporation to reimburse expenses, including attorneys' fees and disbursements, incurred by a person in connection with an appearance as a witness in a proceeding at a time when the person has not been made or threatened to be made a party to a proceeding.

Subd. 6. [DETERMINATION OF ELIGIBILITY.] All determinations whether indemnification of a person is required because the criteria set forth in subdivision 2 have been satisfied and whether a person is entitled to payment or reimbursement of expenses in advance of the final disposition of a proceeding as provided in subdivision 3 shall be made:

(a) By the board by a majority of a quorum. Directors who are at the time parties to the proceeding shall not be counted for determining either a majority or the presence of a quorum;

(b) If a quorum under clause (a) cannot be obtained, by a majority of a committee of the board, consisting solely of two or more directors not at the time parties to the proceeding, duly designated to act in the matter by a majority of the full board including directors who are parties;

(c) If a determination is not made under clause (a) or (b), by special legal counsel, selected either by a majority of the board or a committee by vote pursuant to clause (a) or (b) or, if the requisite quorum of the full board cannot be obtained and the committee cannot be established, by a majority of the full board including directors who are parties;

(d) If a determination is not made under clauses (a) to (c), by the shareholders, excluding the votes of shares held by parties to the proceeding; or

(e) If an adverse determination is made under clauses (a) to (d), or if no determination is made under clauses (a) to (d) within 60 days after the termination of a proceeding or after a request for an advance of expenses, as the case may be, by a court in this state, which may be the same court in which the proceeding involving the person's liability took place, upon application of the person and any notice the court requires.

Subd. 7. [INSURANCE.] A corporation may purchase and

maintain insurance on behalf of a person in that person's official capacity against any liability asserted against and incurred by the person in or arising from that capacity, whether or not the corporation would have been required to indemnify the person against the liability under the provisions of this section.

Subd. 8. [DISCLOSURE.] A corporation that indemnifies or advances expenses to a person in accordance with this section in connection with a proceeding by or on behalf of the corporation shall report the amount of the indemnification or advance and to whom and on whose behalf it was paid as part of the annual financial statements furnished to shareholders pursuant to section 78 covering the period when the indemnification or advance was paid or accrued under the accounting method of the corporation reflected in the financial statements.

Sec. 85. [302A.551] [DISTRIBUTIONS.]

Subdivision 1. [WHEN PERMITTED.] The board may authorize, and the corporation may make, a distribution only if the corporation will be able to pay its debts in the ordinary course of business after making the distribution. The right of the board to authorize, and the corporation to make, distributions may be prohibited, limited, or restricted by, or the rights and priorities of persons to receive distributions may be established by, the articles or bylaws or an agreement.

Subd. 2. [DETERMINATION PRESUMED PROPER.] A determination that the corporation will be able to pay its debts in the ordinary course of business after the distribution is presumed to be proper if the determination is made in compliance with the standard of conduct provided in section 44 on the basis of financial information prepared in accordance with accounting methods, or a fair valuation or other method, reasonable in the circumstances.

Subd. 3. [EFFECT MEASURED.] (a) In the case of a distribution made by a corporation in connection with a purchase, redemption, or other acquisition of its shares, the effect of the distribution shall be measured as of the date on which money or other property is transferred, or indebtedness

payable in installments or otherwise is incurred, by the corporation, or as of the date on which the shareholder ceases to be a shareholder of the corporation with respect to the shares, whichever is the earliest.

(b) The effect of any other distribution shall be measured as of the date of its authorization if payment occurs 120 days or less following the date of authorization, or as of the date of payment if payment occurs more than 120 days following the date of authorization.

(c) Indebtedness of a corporation incurred or issued in a distribution in accordance with this section to a shareholder who as a result of the transaction is no longer a shareholder is on a parity with the indebtedness of the corporation to its general unsecured creditors, except to the extent subordinated, agreed to, or secured by a pledge of any assets of the corporation or a related corporation, or subject to any other agreement between the corporation and the shareholder.

(d) Sections 85 to 88 supersede all other statutes of this state with respect to distributions, and the provisions of Minnesota Statutes, Sections 513.20 to 513.32 do not apply to distributions made by a corporation governed by sections 1 to 125.

Subd. 4. [RESTRICTIONS.] (a) A distribution may be made to the holders of a class or series of shares only if:

(1) All amounts payable to the holders of shares having a preference for the payment of that kind of distribution are paid; and

(2) The payment of the distribution does not reduce the remaining net assets of the corporation below the aggregate preferential amount payable in the event of liquidation to the holders of shares having preferential rights, unless the distribution is made to those shareholders in the order and to the extent of their respective priorities.

(b) If the money or property available for distribution is insufficient to satisfy all preferences, the distributions shall be made pro rata according to the order of priority of preferences by classes and by series within those classes.

Sec. 86. [302A.553] [POWER TO ACQUIRE SHARES.]

Subdivision 1. [WHEN PERMITTED; STATUS OF SHARES.] A corporation may acquire its own shares, subject to section 85. Shares so acquired constitute authorized but unissued shares of the corporation, unless the articles provide that they shall not be reissued, in which case the number of authorized shares is reduced by the number of shares acquired.

Subd. 2. [STATEMENT OF CANCELLATION.] If the number of authorized shares of a corporation is reduced by an acquisition of its shares, the corporation shall, no later than the time it makes its next annual report to shareholders or, if no report is made, no later than three months after the end of the fiscal year in which the acquisition occurs, file with the secretary of state a statement of cancellation showing the reduction in the autnorized shares. The statement shall contain:

(a) The name of the corporation;

(b) The number of acquired shares cancelled, itemized by classes and series; and

(c) The aggregate number of authorized shares itemized by classes and series, after giving effect to the cancellation.

Sec. 87. [302A.557] [LIABILITY OF SHAREHOLDERS FOR ILLEGAL DISTRIBUTIONS.]

Subdivision 1. [LIABILITY.] A shareholder who receives a distribution made in violation of the provisions of section 85 is liable to the corporation, its receiver or other person winding up its affairs, or a director under section 88, subdivision 2, but only to the extent that the distribution received by the shareholder exceeded the amount that properly could have been paid under section 85.

Subd. 2. [STATUTE OF LIMITATIONS.] An action shall not be commenced under this section more than two years from the date of the distribution.

Sec. 88. [302A.559] [LIABILITY OF DIRECTORS FOR ILLEGAL DISTRIBUTIONS.]

Subdivision 1. [LIABILITY.] In addition to any other liabilities, a director who is present and votes for or fails to vote against, or who consents in writing to a distribution made

in violation of section 85 or a restriction contained in the articles or bylaws or an agreement, and who fails to comply with the standard of conduct provided in section 44, is liable to the corporation jointly and severally with all other directors so liable and to other directors under subdivision 3, but only to the extent that the distribution exceeded the amount that properly could have been paid under section 85.

Subd. 2. [CONTRIBUTION FROM SHAREHOLDERS.] A director against whom an action is brought under this section with respect to a distribution may implead in that action all shareholders who received the distribution and may compel pro rata contribution from them in that action to the extent provided in section 87, subdivision 1.

Subd. 3. [IMPLEADER; CONTRIBUTION FROM DIRECTORS.] A director against whom an action is brought under this section with respect to a distribution may implead in that action all other directors who voted for or consented in writing to the distribution and may compel pro rata contribution from them in that action.

Subd. 4. [STATUTE OF LIMITATIONS.] An action shall not be commenced under this section more than two years from the date of the distribution.

MERGER, EXCHANGE, TRANSFER

Sec. 89. [302A.601] [MERGER, EXCHANGE, TRANSFER.]

Subdivision 1. [MERGER.] Any two or more corporations may merge, resulting in a single corporation, with or without a business purpose, pursuant to a plan of merger approved in the manner provided in sections 90 to 96.

Subd. 2. [EXCHANGE.] The shares of one or more classes or series of a corporation may be exchanged for shares of the same or a different class or series of one or more other corporations pursuant to a plan of exchange approved in the manner provided in sections 90, 91, and 94 to 96.

Subd. 3. [TRANSFER.] A corporation may sell, lease, transfer, or otherwise dispose of all or substantially all of its property and assets in the manner provided in section 97.

Sec. 90. [302A.611] [PLAN OF MERGER OR EXCHANGE.]

Subdivision 1. [CONTENTS OF PLAN.] A plan of merger or exchange shall contain:

(a) The names of the corporations proposing to merge or participate in an exchange, and:

(1) In the case of a merger, the name of the surviving corporation;

(2) In the case of an exchange, the name of the acquiring corporation;

(b) The terms and conditions of the proposed merger or exchange;

(c) (1) In the case of a merger, the manner and basis of converting the shares of the constituent corporations into securities of the surviving corporation or of any other corporation, or, in whole or in part, into money or other property; or

(2) In the case of an exchange, the manner and basis of exchanging the shares of other constituent corporations for shares of the acquiring corporation;

(d) In the case of a merger, a statement of any amendments to the articles of the surviving corporation proposed as part of the merger; and

(e) Any other provisions with respect to the proposed merger or exchange that are deemed necessary or desirable.

Subd. 2. [OTHER AGREEMENTS.] The procedure authorized by this section does not limit the power of a corporation to acquire for money or property other than its shares all or part of the shares of a class or series of another corporation by a negotiated agreement with the shareholders of the other corporation.

Sec. 91. [302A.613] [PLAN APPROVAL.]

Subdivision 1. [BOARD APPROVAL; NOTICE TO SHAREHOLDERS.] A resolution containing the plan of merger or exchange shall be approved by the affirmative vote of a majority of the directors present at a meeting of the board of each constituent corporation and shall then be submitted to the shareholders of each constituent corporation at a regular or a special meeting. Written notice shall be given to every shareholder, whether or

not entitled to vote at the meeting, not less than 14 days before the meeting, in the manner provided in section 67 for notice of meetings of shareholders. The written notice shall state that a purpose of the meeting is to consider the proposed plan of merger or exchange. A copy or short description of the plan of merger or exchange shall be included in or enclosed with the notice.

Subd. 2. [APPROVAL BY SHAREHOLDERS.] At the meeting a vote of the shareholders shall be taken on the proposed plan. The plan of merger or exchange is adopted when approved by the affirmative vote of the holders of a majority of all voting shares. A class or series of shares of the corporation is entitled to vote as a class or series if any provision of the plan would, if contained in a proposed amendment to the articles, entitle the class or series of shares to vote as a class or series and, in the case of an exchange, if the class or series is included in the exchange.

Subd. 3. [WHEN APPROVAL BY SHAREHOLDERS NOT REQUIRED.] Notwithstanding the provisions of subdivisions 1 and 2, submission of a plan of merger or exchange to a vote at a meeting of shareholders of a surviving or acquiring corporation is not required if:

(a) The articles of the corporation will not be amended in the transaction;

(b) Each holder of shares of the corporation that were outstanding immediately before the effective date of the transaction will hold the same number of shares with identical rights immediately thereafter;

(c) The number of voting shares of the corporation immediately after the merger or exchange, plus the number of voting shares of the corporation issuable on conversion or exchange of securities other than shares or on the exercise of rights to purchase securities issued by virtue of the terms of the transaction, will not exceed by more than 20 percent the number of voting shares of the corporation immediately before the transaction; and

(d) The number of participating shares of the corporation

immediately after the transaction, plus the number of participating shares of the corporation issuable on conversion or exchange of, or on the exercise of rights to purchase, securities issued in the transaction, will not exceed by more than 20 percent the number of participating shares of the corporation immediately before the transaction. "Participating shares" are outstanding shares of the corporation that entitle their holders to participate without limitation in distributions by the corporation.

Sec. 92. [302A.615] [ARTICLES OF MERGER; CERTIFICATE.]

Subdivision 1. [CONTENTS OF ARTICLES.] Upon receiving the approval required by section 91, articles of merger shall be prepared that contain:

(a) The plan of merger;

(b) For each corporation, either:

(1) A statement that the plan has been approved by a vote of the shareholders pursuant to section 91, subdivision 2; or

(2) A statement that a vote of the shareholders is not required by virtue of section 91, subdivision 3.

Subd. 2. [ARTICLES SIGNED, FILED.] The articles of merger shall be signed on behalf of each constituent corporation and filed with the secretary of state.

Subd. 3. [CERTIFICATE.] The secretary of state shall issue a certificate of merger to the surviving corporation or its legal representative.

Sec. 93. [302A.621] [MERGER OF SUBSIDIARY INTO PARENT.]

Subdivision 1. [WHEN AUTHORIZED; CONTENTS OF PLAN.] A parent owning at least 90 percent of the outstanding shares of each class and series of a subsidiary may merge the subsidiary into itself without a vote of the shareholders of either corporation. A resolution approved by the affirmative vote of a majority of the directors of the parent present shall set forth a plan of merger that contains:

(a) The name of the subsidiary and the name of the parent; and

(b) The manner and basis of converting the shares of the subsidiary into securities of the parent or of another

corporation or, in whole or in part, into money or other property.

Subd. 2. [NOTICE TO SHAREHOLDERS.] A copy of the plan of merger shall be mailed to each shareholder, other than the parent, of the subsidiary.

Subd. 3. [ARTICLES OF MERGER; CONTENTS OF ARTICLES.] Articles of merger shall be prepared that contain:

(a) The plan of merger;

(b) The number of outstanding shares of each class and series of the subsidiary and the number of shares of each class and series owned by the parent; and

(c) The date a copy of the plan of merger was mailed to shareholders, other than the parent, of the subsidiary.

Subd. 4. [ARTICLES SIGNED, FILED.] Within 30 days after a copy of the plan of merger is mailed to shareholders of the subsidiary, or upon waiver of the mailing by the holders of all outstanding shares, the articles of merger shall be signed on behalf of the parent and filed with the secretary of state.

Subd. 5. [CERTIFICATE.] The secretary of state shall issue a certificate of merger to the parent or its legal representative.

Sec. 94. [302A.631] [ABANDONMENT.]

Subdivision 1. [BY SHAREHOLDERS OR PLAN.] After a plan of merger or exchange has been approved at a meeting by the affirmative vote of the holders of a majority of all voting shares of each constituent corporation and before the effective date of the plan, it may be abandoned:

(a) If the shareholders of each of the constituent corporations have considered abandoning the plan and the abandonment has been approved at a meeting by the affirmative vote of the holders of a majority of all voting shares of each constituent corporation;

(b) If the plan itself provides for abandonment and all conditions for abandonment set forth in the plan are met; or

(c) Pursuant to subdivision 2.

Subd. 2. [BY BOARD; ARTICLES OF ABANDONMENT.] If articles of merger have not been filed with the secretary of state and

the plan is to be abandoned, or if a plan of exchange is to be abandoned, a resolution abandoning the plan of merger or exchange may be approved by the affirmative vote of a majority of the directors present, subject to the contract rights of any other person under the plan. If articles of merger have been filed with the secretary of state, the board shall file with the secretary of state articles of abandonment that contain:

(a) The name of the corporation;

(b) The provision of this section under which the plan is abandoned; and

(c) The text of the resolution approved by the affirmative vote of a majority of the directors present abandoning the plan.

Sec. 95. [302A.641] [EFFECTIVE DATE OF MERGER OR EXCHANGE; EFFECT.]

Subdivision 1. [EFFECTIVE DATE.] A merger is effective when the articles of merger are filed with the secretary of state or on a later date specified in the articles of merger. An exchange is effective on the date specified in the plan of exchange.

Subd. 2. [EFFECT ON CORPORATION.] When a merger becomes effective:

(a) The constituent corporations become a single corporation, the surviving corporation;

(b) The separate existence of all constituent corporations except the surviving corporation ceases;

(c) The surviving corporation has all the rights, privileges, immunities, and powers, and is subject to all the duties and liabilities, of a corporation incorporated under sections 1 to 125;

(d) The surviving corporation possesses all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of each of the constituent corporations. All property, real, personal, and mixed, and all debts due on any account, including subscriptions to shares, and all other choses in action, and every other interest of or belonging to or due to each of the constituent corporations vests in the surviving corporation without any further act or deed.

Confirmatory deeds, assignments, or similar instruments to accomplish that vesting may be signed and delivered at any time in the name of a constituent corporation by its current officers or, if the corporation no longer exists, by its last officers. The title to any real estate or any interest therein vested in any of the constituent corporations does not revert nor in any way become impaired by reason of the merger;

(e) The surviving corporation is responsible and liable for all the liabilities and obligations of each of the constituent corporations. A claim of or against or a pending proceeding by or against a constituent corporation may be prosecuted as if the merger had not taken place, or the surviving corporation may be substituted in the place of the constituent corporation. Neither the rights of creditors nor any liens upon the property of a constituent corporation are impaired by the merger; and

(f) The articles of the surviving corporation are deemed to be amended to the extent that changes in its articles, if any, are contained in the plan of merger.

Subd. 3. [EFFECT ON SHAREHOLDERS.] When a merger or exchange becomes effective, the shares of the corporation or corporations to be converted or exchanged under the terms of the plan cease to exist in the case of a merger, or are deemed to be exchanged in the case of an exchange. The holders of those shares are entitled only to the securities, money, or other property into which those shares have been converted or for which those shares have been exchanged in accordance with the plan, subject to any dissenter's rights under section 80.

Sec. 96. [302A.651] [MERGER OR EXCHANGE WITH FOREIGN CORPORATION.]

Subdivision 1. [WHEN PERMITTED.] A domestic corporation may merge with or participate in an exchange with a foreign corporation by following the procedures set forth in this section, if the merger or exchange is permitted by the laws of the state under which the foreign corporation is incorporated.

Subd. 2. [LAWS APPLICABLE BEFORE TRANSACTION.] Each domestic corporation shall comply with the provisions of sections 85 to 96 with respect to the merger or exchange of

shares of corporations and each foreign corporation shall comply with the applicable provisions of the laws under which it was incorporated or by which it is governed.

Subd. 3. [DOMESTIC SURVIVING CORPORATION.] If the surviving corporation in a merger will be a domestic corporation, it shall comply with all the provisions of sections 1 to 125.

Subd. 4. [FOREIGN SURVIVING CORPORATION.] If the surviving corporation in a merger will be a foreign corporation and will transact business in this state, it shall comply with the provisions of Minnesota Statutes, Chapter 303 with respect to foreign corporations. In every case the surviving corporation shall file with the secretary of state:

(a) An agreement that it may be served with process in this state in a proceeding for the enforcement of an obligation of a constituent corporation and in a proceeding for the enforcement of the rights of a dissenting shareholder of a constituent corporation against the surviving corporation;

(b) An irrevocable appointment of the secretary of state as its agent to accept service of process in any proceeding and an address to which process may be forwarded; and

(c) An agreement that it will promptly pay to the dissenting shareholders of each domestic constituent corporation the amount, if any, to which they are entitled under section 81.

Sec. 97. [302A.661] [TRANSFER OF ASSETS; WHEN PERMITTED.]

Subdivision 1. [SHAREHOLDER APPROVAL: WHEN NOT REQUIRED.] A corporation, by affirmative vote of a majority of the directors present, may sell, lease, transfer, or otherwise dispose of all or substantially all of its property and assets in the usual and regular course of its business and grant a security interest in all or substantially all of its property and assets whether or not in the usual and regular course of its business, upon those terms and conditions and for those considerations, which may be money, securities, or other instruments for the payment of money or other property, as the board deems expedient, in which case no shareholder approval is required.

Subd. 2. [SHAREHOLDER APPROVAL: WHEN REQUIRED.] A corporation, by affirmative vote of a majority of the directors present, may sell, lease, transfer, or otherwise dispose of all or substantially all of its property and assets, including its good will, not in the usual and regular course of its business, upon those terms and conditions and for those considerations, which may be money, securities, or other instruments for the payment of money or other property, as the board deems expedient, when approved by the affirmative vote of the holders of a majority of all voting shares at a regular or special meeting of the shareholders. Notice of the meeting shall be given to all shareholders whether or not they are entitled to vote at the meeting.

Subd. 3. [SIGNING OF DOCUMENTS.] Confirmatory deeds, assignments, or similar instruments to evidence a sale, lease, transfer, or other disposition may be signed and delivered at any time in the name of the transferor by its current officers or, if the corporation no longer exists, by its last officers.

Subd. 4. [TRANSFEREE LIABILITY.] The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by sections 1 to 125 or other statutes of this state.

DISSOLUTION

Sec. 98. [302A.701] [METHODS OF DISSOLUTION.]

A corporation may be dissolved:

(a) By the incorporators pursuant to section 99;

(b) By the shareholders pursuant to sections 100 to 106; or

(c) By order of a court pursuant to sections 107 to 115.

Sec. 99. [302A.711] [VOLUNTARY DISSOLUTION BY INCORPORATORS.]

Subdivision 1. [MANNER.] A corporation that has not issued shares may be dissolved by the incorporators in the manner set forth in this section.

Subd. 2. [ARTICLES OF DISSOLUTION.] (a) A majority of the incorporators shall sign articles of dissolution containing:

(1) The name of the corporation;

(2) The date of incorporation;

(3) A statement that shares have not been issued;

(4) A statement that all consideration received from subscribers for shares to be issued, less expenses incurred in the organization of the corporation, has been returned to the subscribers; and

(5) A statement that no debts remain unpaid.

(b) The articles of dissolution shall be filed with the secretary of state.

Subd. 3. [EFFECTIVE DATE.] When the articles of dissolution have been filed with the secretary of state, the corporation is dissolved.

Subd. 4. [CERTIFICATE.] The secretary of state shall issue to the dissolved corporation or its legal representative a certificate of dissolution that contains:

(a) The name of the corporation;

(b) The date and time the articles of dissolution were filed with the secretary of state; and

(c) A statement that the corporation is dissolved.

Sec. 100. [302A.721] [VOLUNTARY DISSOLUTION BY SHAREHOLDERS.]

Subdivision 1. [MANNER.] A corporation may be dissolved by the shareholders when authorized in the manner set forth in this section.

Subd. 2. [NOTICE; APPROVAL.] (a) Written notice shall be given to each shareholder entitled to vote at a meeting of shareholders within the time and in the manner provided in section 67 for notice of meetings of shareholders and, whether the meeting is a regular or a special meeting, shall state that a purpose of the meeting is to consider the advisability of dissolving the corporation.

(b) The proposed dissolution shall be submitted for approval at a meeting of shareholders. If the proposed dissolution is approved at a meeting by the affirmative vote of the holders of a majority of all voting shares, the dissolution shall be commenced.

Sec. 101. [302A.723] [FILING NOTICE OF INTENT TO DISSOLVE;

EFFECT.]

Subdivision 1. [CONTENTS.] If dissolution of the corporation is approved pursuant to section 100, subdivision 2, the corporation shall file with the secretary of state a notice of intent to dissolve. The notice shall contain:

(a) The name of the corporation;

(b) The date and place of the meeting at which the resolution was approved pursuant to section 100, subdivision 2; and

(c) A statement that the requisite vote of the shareholders was received, or that all shareholders signed a written action.

Subd. 2. [WINDING UP.] When the notice of intent to dissolve has been filed with the secretary of state, and subject to section 105, the corporation shall cease to carry on its business, except to the extent necessary for the winding up of the corporation. The shareholders shall retain the right to revoke the dissolution proceedings in accordance with section 105 and the right to remove directors or fill vacancies on the board. The corporate existence continues to the extent necessary to wind up the affairs of the corporation until the dissolution proceedings are revoked or articles of dissolution are filed with the secretary of state.

Subd. 3. [REMEDIES CONTINUED.] The filing with the secretary of state of a notice of intent to dissolve does not affect any remedy in favor of the corporation or any remedy against it or its directors, officers, or shareholders in those capacities, except as provided in section 117.

Sec. 102. [302A.725] [PROCEDURE IN DISSOLUTION.]

Subdivision 1. [COLLECTION; PAYMENT.] When a notice of intent to dissolve has been filed with the secretary of state, the board, or the officers acting under the direction of the board, shall proceed as soon as possible:

(a) To collect or make provision for the collection of all debts due or owing to the corporation, including unpaid subscriptions for shares; and

(b) To pay or make provision for the payment of all debts, obligations, and liabilities of the corporation according to

their priorities.

Subd. 2. [TRANSFER OF ASSETS.] Notwithstanding the provisions of section 97, when a notice of intent to dissolve has been filed with the secretary of state, the directors may sell, lease, transfer, or otherwise dispose of all or substantially all of the property and assets of a dissolving corporation without a vote of the shareholders.

Subd. 3. [DISTRIBUTION TO SHAREHOLDERS.] All tangible or intangible property, including money, remaining after the discharge of the debts, obligations, and liabilities of the corporation shall be distributed to the shareholders in accordance with section 95, subdivision 4.

Sec. 103. [302A.727] [NOTICE TO CREDITORS AND CLAIMANTS.]

Subdivision 1. [WHEN PERMITTED; HOW GIVEN.] When a notice of intent to dissolve has been filed with the secretary of state, the corporation may give notice of the filing to each known creditor of and claimant against the corporation at the last known address of each known present, future, or contingent creditor and claimant. The corporation may give published notice to known creditors or claimants whose address is unknown and to unknown present, future, or contingent creditors and claimants, by publishing the notice once each week for four successive weeks in a legal newspaper as defined in Minnesota Statutes, Section 331.02 in the county or counties where the registered office and the principal executive office of the corporation are located.

Subd. 2. [CONTENTS.] The notice to creditors and claimants shall contain:

(a) A statement that the corporation is in the process of dissolving;

(b) A statement that the corporation has filed with the secretary of state a notice of intent to dissolve;

(c) The date of filing the notice of intent to dissolve;

(d) The address of the office to which written claims against the corporation must be presented; and

(e) The date by which all the claims must be received, which shall be the later of 90 days after the notice of intent

to dissolve was filed with the secretary of state or 90 days after the last date on which notice to creditors and claimants was given.

Sec. 104. [302A.729] [CLAIMS IN DISSOLUTION.]

Subdivision 1. [PROCEDURE.] If the corporation gives proper notice to creditors and claimants pursuant to section 103:

(a) The claim of a creditor or claimant to whom notice is given who fails to file a claim according to the procedures set forth by the corporation on or before the date set forth in the notice is subject to the provisions of section 117;

(b) The corporation has 30 days from the receipt of each claim to accept or reject the claim; a claim not expressly rejected is deemed accepted; and

(c) A creditor or claimant to whom notice is given and whose claim is rejected by the corporation has 60 days from the date of rejection, or 180 days from the date the corporation filed with the secretary of state the notice of intent to dissolve, whichever is longer, to pursue any other remedies with respect to the claim. If the creditor or claimant does not initiate legal, administrative, or arbitration proceedings with respect to the claim during that period, the claim is subject to the provisions of section 117.

Subd. 2. [STATUTE OF LIMITATIONS.] The claim of a creditor or claimant to whom notice is not given and who does not initiate legal, administrative, or arbitration proceedings concerning the claim within two years after the date of filing the notice of intent to dissolve is thereafter subject to the provisions of 117.

Sec. 105. [302A.731] [REVOCATION OF DISSOLUTION PROCEEDINGS.]

Subdivision 1. [GENERALLY.] Dissolution proceedings commenced pursuant to section 100 may be revoked prior to filing of articles of dissolution.

Subd. 2. [NOTICE TO SHAREHOLDERS; APPROVAL.] Written notice shall be given to every shareholder entitled to vote at a shareholders' meeting within the time and in the manner provided in section 67 for notice of meetings of shareholders and shall

state that a purpose of the meeting is to consider the advisability of revoking the dissolution proceedings. The proposed revocation shall be submitted to the shareholders at the meeting. If the proposed revocation is approved at a meeting by the affirmative vote of the holders of a majority of all voting shares, the dissolution proceedings are revoked.

Subd. 3. [EFFECTIVE DATE; EFFECT.] Revocation of dissolution proceedings is effective when a notice of revocation is filed with the secretary of state. The corporation may thereafter resume business.

Sec. 106. [302A.733] [ARTICLES OF DISSOLUTION; CERTIFICATE OF DISSOLUTION; EFFECT.]

Subdivision 1. [ARTICLES; WHEN FILED.] Articles of dissolution for a corporation dissolving pursuant to section 100 shall be filed with the secretary of state after:

(a) The payment of claims of all known creditors and claimants has been made or provided for;

(b) The 180 day period described in section 104, subdivision 1, clause (c) has expired, if the corporation has given notice to creditors and claimants of the corporation in the manner described in section 103; or, in all other cases,

(c) The two year period described in section 104, subdivision 2 has expired.

Subd. 2. [CONTENTS OF ARTICLES.] The articles of dissolution shall state:

(a) Whether or not notice has been given to all creditors and claimants of the corporation in the manner provided in section 103, and, if notice has been given, the last date on which the notice was given and the date on which the longer of the periods described in section 104, subdivision 1, clause (c) expired;

(b) That all debts, obligations, and liabilities of the corporation have been paid and discharged or that adequate provisions have been made therefor;

(c) That the remaining property, assets, and claims of the corporation have been distributed among its shareholders in accordance with section 85, subdivision 4, or that adequate

provision has been made for that distribution; and

(d) That there are no pending legal, administrative, or arbitration proceedings by or against the corporation, or that adequate provision has been made for the satisfaction of any judgment, order, or decree that may be entered against it in a pending proceeding, and that all other claims are barred under section 117.

Subd. 3. [EFFECTIVE DATE.] When the articles of dissolution have been filed with the secretary of state, the corporation is dissolved.

Subd. 4. [CERTIFICATE.] The secretary of state shall issue to the dissolved corporation or its legal representative a certificate of dissolution that contains:

(a) The name of the corporation;

(b) The date and time the articles of dissolution were filed with the secretary of state; and

(c) A statement that the corporation is dissolved.

Sec. 107. [302A.741] [SUPERVISED VOLUNTARY DISSOLUTION.]

After the notice of intent to dissolve has been filed with the secretary of state and before a certificate of dissolution has been issued, the corporation, or for good cause shown, a shareholder or creditor may apply to a court within the county in which the registered office of the corporation is situated to have the dissolution conducted or continued under the supervision of the court as provided in sections 108 to 117.

Sec. 108. [302A.751] [INVOLUNTARY DISSOLUTION.]

Subdivision 1. [WHEN PERMITTED.] A court may grant any equitable relief it deems just and reasonable in the circumstances or may dissolve a corporation and liquidate its assets and business:

(a) In a supervised voluntary dissolution pursuant to section 107;

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

(1) The directors or the persons having the authority otherwise vested in the board are deadlocked in the management of the corporate affairs and the shareholders are unable to

break the deadlock;

(2) The directors or those in control of the corporation have acted fraudulently, illegally, or in a manner persistently unfair toward one or more minority shareholders;

(3) The shareholders of the corporation are so divided in voting power that, for a period that includes the time when two consecutive regular meetings were held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors;

(4) The corporate assets are being misapplied or wasted; or

(5) The period of duration as provided in the articles has expired and has not been extended as provided in section 120;

(c) In an action by a creditor when:

(1) The claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied; or

(2) The corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is unable to pay its debts in the ordinary course of business; or

(d) In an action by the attorney general to dissolve the corporation in accordance with section 111 when it is established that a decree of dissolution is appropriate.

Subd. 2. [CONDITION OF CORPORATION.] In determining whether to order dissolution, the court shall take into consideration the financial condition of the corporation but shall not refuse to order dissolution solely on the ground that the corporation has accumulated or current operating profits.

Subd. 3. [EXPENSES.] If the court finds that a party to a proceeding brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including attorneys' fees and disbursements, to any of the other parties.

Subd. 4. [VENUE; PARTIES.] Proceedings under this section shall be brought in a court within the county in which the registered office of the corporation is located. It is not necessary to make shareholders parties to the action or

proceeding unless relief is sought against them personally.

Sec. 109. [302A.753] [PROCEDURE IN INVOLUNTARY OR SUPERVISED VOLUNTARY DISSOLUTION.]

Subdivision 1. [ACTION BEFORE HEARING.] In dissolution proceedings the court may issue injunctions, appoint receivers with all powers and duties the court directs, take other actions required to preserve the corporate assets wherever situated, and carry on the business of the corporation until a full hearing can be held.

Subd. 2. [ACTION AFTER HEARING.] After a full hearing has been held, upon whatever notice the court directs to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a receiver to collect the corporate assets, including all amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares. A receiver has authority, subject to the order of the court, to continue the business of the corporation and to sell, lease, transfer, or otherwise dispose of all or any of the property and assets of the corporation either at public or private sale.

Subd. 3. [DISCHARGE OF OBLIGATIONS.] The assets of the corporation or the proceeds resulting from a sale, lease, transfer, or other disposition shall be applied in the following order of priority to the payment and discharge of:

(a) The costs and expenses of the proceedings, including attorneys' fees and disbursements;

(b) Debts, taxes and assessments due the United States, the state of Minnesota and their subdivisions, and other states and their subdivisions, in that order;

(c) Claims duly proved and allowed to employees under the provisions of the workers' compensation act; provided, that claims under this clause shall not be allowed if the corporation carried workers' compensation insurance, as provided by law, at the time the injury was sustained;

(d) Claims, including the value of all compensation paid in any medium other than money, duly proved and allowed to employees for services performed within three months preceding

the appointment of the receiver, if any; and

(e) Other claims duly proved and allowed.

Subd. 4. [REMAINDER TO SHAREHOLDERS.] After payment of the expenses of receivership and claims of creditors duly proved, the remaining assets, if any, shall be distributed to the shareholders in accordance with section 85, subdivision 4.

Sec. 110. [302A.755] [QUALIFICATIONS OF RECEIVERS; POWERS.]

Subdivision 1. [QUALIFICATIONS.] A receiver shall be a natural person or a domestic corporation or a foreign corporation authorized to transact business in this state. A receiver shall give bond as directed by the court with the sureties required by the court.

Subd. 2. [POWERS.] A receiver may sue and defend in all courts as receiver of the corporation. The court appointing the receiver has exclusive jurisdiction of the corporation and its property.

Sec. 111. [302A.757] [ACTION BY ATTORNEY GENERAL.]

Subdivision 1. [WHEN PERMITTED.] A corporation may be dissolved involuntarily by a decree of a court in this state in an action filed by the attorney general when it is established that:

(a) The articles and certificate of incorporation were procured through fraud;

(b) The corporation was incorporated for a purpose not permitted by section 5;

(c) The corporation failed to comply with the requirements of sections 2 to 20 essential to incorporation under or election to become governed by sections 1 to 125;

(d) The corporation has flagrantly violated a provision of sections 1 to 125, or has violated a provision of sections 1 to 125 more than once, or has violated more than one provision of sections 1 to 125; or

(e) The corporation has acted, or failed to act, in a manner that constitutes surrender or abandonment of the corporate franchise, privileges, or enterprise.

Subd. 2. [NOTICE TO CORPORATION; CORRECTION.] An action

shall not be commenced under this section until 30 days after notice to the corporation by the attorney general of the reason for the filing of the action. If the reason for filing the action is an act that the corporation has done, or omitted to do, and the act or omission may be corrected by an amendment of the articles or bylaws or by performance of or abstention from the act, the attorney general shall give the corporation 30 additional days in which to effect the correction before filing the action.

Sec. 112. [302A.759] [FILING CLAIMS IN PROCEEDINGS TO DISSOLVE.]

Subdivision 1. In proceedings referred to in section 108 to dissolve a corporation, the court may require all creditors and claimants of the corporation to file their claims under oath with the clerk of court or with the receiver in a form prescribed by the court.

Subd. 2. If the court requires the filing of claims, it shall fix a date, which shall be not less than 120 days from the date of the order, as the last day for the filing of claims, and shall prescribe the notice of the fixed date that shall be given to creditors and claimants. Before the fixed date, the court may extend the time for filing claims. Creditors and claimants failing to file claims on or before the fixed date may be barred, by order of court, from claiming an interest in or receiving payment out of the property or assets of the corporation.

Sec. 113. [302A.761] [DISCONTINUANCE OF DISSOLUTION PROCEEDINGS.]

The involuntary or supervised voluntary dissolution of a corporation shall be discontinued at any time during the dissolution proceedings when it is established that cause for dissolution no longer exists. When this is established, the court shall dismiss the proceedings and direct the receiver, if any, to redeliver to the corporation all its remaining property and assets.

Sec. 114. [302A.763] [DECREE OF DISSOLUTION.]

Subdivision 1. [WHEN ENTERED.] In an involuntary or

supervised voluntary dissolution after the costs and expenses of the proceedings and all debts, obligations, and liabilities of the corporation have been paid or discharged and all of its remaining property and assets have been distributed to its shareholders or, if its property and assets are not sufficient to satisfy and discharge the costs, expenses, debts, obligations, and liabilities, when all the property and assets have been applied so far as they will go to their payment according to the priorities set forth in section 109, the court shall enter a decree dissolving the corporation.

Subd. 2. [EFFECTIVE DATE.] When the decree dissolving the corporation has been entered, the corporation is dissolved.

Sec. 115. [302A.765] [FILING DECREE.]

After the court enters a decree dissolving a corporation, the clerk of court shall cause a certified copy of the decree to be filed with the secretary of state. The secretary of state shall not charge a fee for filing the decree.

Sec. 116. [302A.771] [DEPOSIT WITH STATE TREASURER OF AMOUNT DUE CERTAIN SHAREHOLDERS.]

Upon dissolution of a corporation, the portion of the assets distributable to a shareholder who is unknown or cannot be found, or who is under disability, if there is no person legally competent to receive the distributive portion, shall be reduced to money and deposited with the state treasurer. The amount deposited is appropriated to the state treasurer and shall be paid over to the shareholder or a legal representative, upon proof satisfactory to the state treasurer of a right to payment.

Sec. 117. [302A.781] [CLAIMS BARRED; EXCEPTIONS.]

Subdivision 1. [CLAIMS BARRED.] A creditor or claimant who does not file a claim or pursue a remedy in a legal, administrative, or arbitration proceeding under sections 104, 107, 108, or 112, or in some other legal, administrative, or arbitration proceeding pending on the date of dissolution, and all those claiming through or under the creditor or claimant, are forever barred from suing on that claim or otherwise realizing upon or enforcing it, except as provided in this

shall not be commenced under this section until 30 days after notice to the corporation by the attorney general of the reason for the filing of the action. If the reason for filing the action is an act that the corporation has done, or omitted to do, and the act or omission may be corrected by an amendment of the articles or bylaws or by performance of or abstention from the act, the attorney general shall give the corporation 30 additional days in which to effect the correction before filing the action.

Sec. 112. [302A.759] [FILING CLAIMS IN PROCEEDINGS TO DISSOLVE.]

Subdivision 1. In proceedings referred to in section 108 to dissolve a corporation, the court may require all creditors and claimants of the corporation to file their claims under oath with the clerk of court or with the receiver in a form prescribed by the court.

Subd. 2. If the court requires the filing of claims, it shall fix a date, which shall be not less than 120 days from the date of the order, as the last day for the filing of claims, and shall prescribe the notice of the fixed date that shall be given to creditors and claimants. Before the fixed date, the court may extend the time for filing claims. Creditors and claimants failing to file claims on or before the fixed date may be barred, by order of court, from claiming an interest in or receiving payment out of the property or assets of the corporation.

Sec. 113. [302A.761] [DISCONTINUANCE OF DISSOLUTION PROCEEDINGS.]

The involuntary or supervised voluntary dissolution of a corporation shall be discontinued at any time during the dissolution proceedings when it is established that cause for dissolution no longer exists. When this is established, the court shall dismiss the proceedings and direct the receiver, if any, to redeliver to the corporation all its remaining property and assets.

Sec. 114. [302A.763] [DECREE OF DISSOLUTION.]

Subdivision 1. [WHEN ENTERED.] In an involuntary or

supervised voluntary dissolution after the costs and expenses of the proceedings and all debts, obligations, and liabilities of the corporation have been paid or discharged and all of its remaining property and assets have been distributed to its shareholders or, if its property and assets are not sufficient to satisfy and discharge the costs, expenses, debts, obligations, and liabilities, when all the property and assets have been applied so far as they will go to their payment according to the priorities set forth in section 109, the court shall enter a decree dissolving the corporation.

Subd. 2. [EFFECTIVE DATE.] When the decree dissolving the corporation has been entered, the corporation is dissolved.

Sec. 115. [302A.765] [FILING DECREE.]

After the court enters a decree dissolving a corporation, the clerk of court shall cause a certified copy of the decree to be filed with the secretary of state. The secretary of state shall not charge a fee for filing the decree.

Sec. 116. [302A.771] [DEPOSIT WITH STATE TREASURER OF AMOUNT DUE CERTAIN SHAREHOLDERS.]

Upon dissolution of a corporation, the portion of the assets distributable to a shareholder who is unknown or cannot be found, or who is under disability, if there is no person legally competent to receive the distributive portion, shall be reduced to money and deposited with the state treasurer. The amount deposited is appropriated to the state treasurer and shall be paid over to the shareholder or a legal representative, upon proof satisfactory to the state treasurer of a right to payment.

Sec. 117. [302A.781] [CLAIMS BARRED; EXCEPTIONS.]

Subdivision 1. [CLAIMS BARRED.] A creditor or claimant who does not file a claim or pursue a remedy in a legal, administrative, or arbitration proceeding under sections 104, 107, 108, or 112, or in some other legal, administrative, or arbitration proceeding pending on the date of dissolution, and all those claiming through or under the creditor or claimant, are forever barred from suing on that claim or otherwise realizing upon or enforcing it, except as provided in this

section.

Subd. 2. [CLAIMS REOPENED.] At any time within one year after articles of dissolution have been filed with the secretary of state, or a decree of dissolution has been entered, a creditor or claimant who shows good cause for not having previously filed the claim may apply to a court in this state to allow a claim:

(a) Against the corporation to the extent of undistributed assets; or

(b) If the undistributed assets are not sufficient to satisfy the claim, against a shareholder, whose liability shall be limited to a portion of the claim that is equal to the portion of the distributions to shareholders in liquidation or dissolution received by the shareholder.

Subd. 3. [CLAIMS PERMITTED.] All debts, obligations, and liabilities incurred during dissolution proceedings shall be paid by the corporation before the distribution of assets to a shareholder. A person to whom this kind of debt, obligation, or liability is owed but not paid may pursue any remedy against the officers, directors, and shareholders of the corporation before the expiration of the applicable statute of limitations. This subdivision does not apply to dissolution under the supervision or order of a court.

Sec. 118. [302A.783] [RIGHT TO SUE OR DEFEND AFTER DISSOLUTION.]

After a corporation has been dissolved, any of its former officers, directors, or shareholders may assert or defend, in the name of the corporation, any claim by or against the corporation.

Sec. 119. [302A.791] [OMITTED ASSETS.]

Title to assets remaining after payment of all debts, obligations, or liabilities and after distributions to shareholders may be transferred by a court in this state.

EXTENSION

Sec. 120. [302A.801] [EXTENSION AFTER DURATION EXPIRED.]

Subdivision 1. [EXTENSION BY AMENDMENT.] A corporation whose period of duration as provided in the articles has expired

and which has continued to do business despite that expiration may reinstate its articles and extend the period of corporate duration, including making the duration perpetual, at any time after the date of expiration by filing an amendment to the articles as set forth in this section.

Subd. 2. [CONTENTS OF AMENDMENT.] An amendment to the articles shall be approved by the affirmative vote of a majority of the directors present and shall include:

(a) The date the period of duration expired under the articles;

(b) A statement that the period of duration will be perpetual or, if some shorter period is to be provided, the date to which the period of duration is extended; and

(c) A statement that the corporation has been in continuous operation since before the date of expiration of its original period of duration.

Subd. 3. [APPROVAL BY SHAREHOLDERS.] The amendment to the articles shall be presented, after notice, to a meeting of the shareholders. The amendment is adopted when approved by the shareholders pursuant to section 14.

Subd. 4. [FILING.] Articles of amendment conforming to section 16 shall be filed with the secretary of state.

Sec. 121. [302A.805] [EFFECT OF EXTENSION.]

Filing with the secretary of state of articles of amendment extending the period of duration of a corporation:

(a) Relates back to the date of expiration of the original period of duration of the corporation as provided in the articles;

(b) Validates contracts or other acts within the authority of the articles, and the corporation is liable for those contracts or acts; and

(c) Restores to the corporation all the assets and rights of the corporation to the extent they were held by the corporation before expiration of its original period of duration, except those sold or otherwise distributed after that time.

ANNUAL REPORT

Sec. 122. [302A.821] [ANNUAL REPORT.]

Subdivision 1. [FORM.] By January 15 each year, the secretary of state shall mail to every corporation at its registered office an annual report form. By July 1 of the same year, the officers of each corporation shall cause the form to be completed and filed with the secretary of state. The report shall contain:

(a) The name of the corporation;

(b) The address of its registered office; and

(c) The name of its registered agent, if any.

Subd. 2. [FILING; RETURN FOR CORRECTION.] If the annual report conforms to the requirements of subdivision 1, the secretary of state shall file it; in all other cases, the secretary of state shall return the report to the corporation. If the report is made to conform to the requirements of subdivision 1 and is filed with the secretary of state within 30 days from the return of the report to the corporation, the provisions of subdivisions 3 and 4 do not apply.

Subd. 3. [LOSS OF GOOD STANDING.] A corporation that fails to file an annual report conforming to the requirements of subdivision 1 loses its good standing in this state. The corporation may regain its good standing in this state by filing the annual report.

Subd. 4. [NOTICE OF REPEATED VIOLATION; PENALTY.] If a corporation fails for two successive years to file an annual report conforming to the requirements of subdivision 1, the secretary of state shall give notice by registered mail to the corporation at its registered office that it has violated this section. If the corporation does not return an annual report conforming to the requirements of subdivision 1 within 30 days after the mailing of the notice, the corporation shall forfeit to the state $25.

ACTIONS AGAINST CORPORATIONS

Sec. 123. [302A.901] [SERVICE OF PROCESS ON CORPORATION.]

Subdivision 1. [WHO MAY BE SERVED.] A process, notice, or demand required or permitted by law to be served upon a corporation may be served either upon the registered agent, if

any, of the corporation named in the articles, or upon an officer of the corporation, or upon the secretary of state as provided in this section.

Subd. 2. [SERVICE ON SECRETARY OF STATE: WHEN PERMITTED.] If a corporation has appointed and maintained a registered agent in this state but neither its registered agent nor an officer of the corporation can be found at the registered office, or if a corporation fails to appoint or maintain a registered agent in this state and an officer of the corporation cannot be found at the registered office, then the secretary of state is the agent of the corporation upon whom the process, notice, or demand may be served. The return of the sheriff that no registered agent or officer can be found at the registered office in a county is conclusive evidence that the corporation has no registered agent or officer at its registered office. Service on the secretary of state of any process, notice, or demand is deemed personal service upon the corporation and shall be made by filing with the secretary of state duplicate copies of the process, notice, or demand. The secretary of state shall immediately forward, by registered mail, addressed to the corporation at its registered office, a copy of the process, notice, or demand. Service on the secretary of state is returnable in not less than 30 days notwithstanding a shorter period specified in the process, notice, or demand.

Subd. 3. [RECORD OF SERVICE.] There shall be maintained in the office of the secretary of state a record of all processes, notices, and demands served upon the secretary of state under this section, including the date and time of service and the action taken with reference to it.

Subd. 4. [OTHER METHODS OF SERVICE.] Nothing in this section limits the right of a person to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

Sec. 124. [302A.917] [STATE INTERESTED; PROCEEDINGS.]

If it appears at any stage of a proceeding in a court in this state that the state is, or is likely to be, interested

therein, or that it is a matter of general public interest, the court shall order that a copy of the complaint or petition be served upon the attorney general in the same manner prescribed for serving a summons in a civil action. The attorney general shall intervene in a proceeding when the attorney general determines that the public interest requires it, whether or not the attorney general has been served.

Sec. 125. [302A.001] [CITATION.]

Sections 1 to 125 may be cited as the "Minnesota Business Corporation Act."

Sec. 126. Minnesota Statutes 1980, Section 53.01, is amended to read:

53.01 [ORGANIZATION.]

It is lawful for three or more persons, who desire to form a corporation for the purpose of carrying on primarily the business of loaning money in small amounts to persons within the conditions set forth in this chapter, to organize, under this chapter, an industrial loan and thrift company, by filing with the secretary of state and the county recorder in the county in which the place of business of the corporation is located, a certificate of incorporation, and upon paying the fees prescribed by sections ~~301.07 and 301.071~~ 1 to 125 and upon compliance with the procedure provided for the organization and government of ordinary corporations under the laws of this state, and upon compliance with the additional requirements of this chapter prior to receiving authorization to do business.

Sec. 127. Minnesota Statutes 1980, Section 303.05, Subdivision 1, is amended to read:

Subdivision 1. [CERTIFICATE OF AUTHORITY, WHEN NOT ISSUED.] No certificate of authority shall be issued to a foreign corporation the name of which would be prohibited to a corporation which might then be formed under the provisions of sections 301.01 to 301.61, under the provisions of sections 1 to 125, or under the Minnesota Nonprofit Corporation Act; provided, that, if the name of such corporation does not end with the word "corporation," or the word "incorporated," or the abbreviation "Inc.," or does not contain the word "company" or the

abbreviation "Co." not immediately preceded by the word "and" or the character "&," a certificate of authority may be issued to it if it agrees in its application for a certificate of authority to add at the end of its name the word "incorporated" or the abbreviation "Inc." in transacting business within this state. The name of such corporation may contain the word "cooperative" if it is a cooperative corporation generally similar to the kind which might then be organized under the laws of this state. If such corporation is a corporation obtaining a certificate of authority pursuant to the provisions of section 303.04, the name of such corporation may contain the words "bank," "trust," "building and loan," or "savings" and such corporation shall not be required to add the word "incorporated" or the abbreviation "Inc." to its corporate name.

Sec. 128. Minnesota Statutes 1980, Section 308.341, is amended to read:

308.341 [COOPERATIVE RURAL TELEPHONE COMPANIES, DISSOLUTION.]

Any cooperative rural telephone company organized under Revised Statutes 1905, Chapter 58, or the general laws of Minnesota 1905, Chapters 276 and 313, may dissolve by voluntary proceedings as provided by Minnesota Statutes, Sections 301.47 and 301.48, or sections 100 to 106, whenever a resolution therefor, is adopted by a majority of the voting power of all stockholders or shareholders at a meeting duly called for that purpose.

Sec. 129. Minnesota Statutes 1980, Section 319A.03, is amended to read:

319A.03 [FORMATION OF CORPORATION.]

One or more natural professional persons may form a corporation pursuant to ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317 for the purposes hereinafter set forth.

Sec. 130. Minnesota Statutes 1980, Section 319A.05, is amended to read:

319A.05 [APPLICABILITY OF CORPORATION ACTS.]

A corporation incorporating under sections 319A.01 to

319A.22 and ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317 shall proceed in the manner specified in ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317. After incorporation a professional corporation shall enjoy the powers and privileges and shall be subject to the duties and liabilities of other corporations organized under ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317, except insofar as the same may be limited or enlarged by sections 319A.01 to 319A.22. If any provision of sections 319A.01 to 319A.22 conflicts with the provisions of ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317, sections 319A.01 to 319A.22 ~~takes~~ take precedence.

Sec. 131. Minnesota Statutes 1980, Section 319A.12, Subdivision 1a, is amended to read:

Subd. 1a. A professional corporation may at any time by amendment to its articles of incorporation relinquish the powers and privileges conferred upon it by this chapter and elect to be governed thereafter solely by the provisions of ~~either chapter 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317. Notwithstanding any provision of this chapter, the representative of a deceased or incompetent shareholder of a professional corporation shall have authority to vote the deceased or incompetent shareholder's shares on the question of adopting such an amendment.

Sec. 132. Minnesota Statutes 1980, Section 319A.12, Subdivision 2, is amended to read:

Subd. 2. If within 90 days following the date of death of a shareholder or member of a professional corporation or the loss of his license to render professional service all of the shares or membership owned by the deceased or disqualified shareholder or member have not been transferred to and acquired by the corporation or persons qualified to own the shares or membership, the corporation shall thereafter be governed solely by the provisions of ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317 and shall not enjoy any of the powers and privileges conferred by sections 319A.01 to 319A.22. When the corporation ceases to be authorized to render

professional service, its corporate name must be changed to comply with the corporate name provision of ~~chapters 301 or~~ sections 301.01 to 301.67, sections 1 to 125, or chapter 317, and any words, phrases or abbreviations contained therein to comply with the provisions of sections 319A.01 to 319A.22 shall be eliminated.

Sec. 133. Minnesota Statutes 1980, Section 391A.20, is amended to read:

319A.20 [SUSPENSION OR REVOCATION.]

The corporate charter of a professional corporation or the certificate of authority of a foreign professional corporation may be suspended or revoked pursuant to sections 301.57, 111, or 317.62 for the reasons enumerated therein or for failure to comply with the provisions of sections 319A.01 to 319A.22 or the rules and regulations of any board. A board through the attorney general may institute such suspension or revocation proceedings.

Sec. 134. Minnesota Statutes 1980, Section 367.42, Subdivision 1, is amended to read:

367.42 [DUTIES OF DEPUTY CONSTABLES.]

Subdivision 1. Notwithstanding any general or local law or charter to the contrary, any deputy constable employed or elected on or after July 1, 1979 by a political subdivision of the state of Minnesota shall have the following powers and duties:

(a) To have the powers of arrest of a private person;

(b) To perform the duties of a constable prescribed by law relative to election procedure;

(c) To perform the following duties at the direction of the county sheriff or constable:

~~(i) To conduct foreclosure sales on corporation shares pursuant to section 301.17;~~

~~(ii)~~ (i) To inspect communication wire and cable or records of such wire and cable pursuant to section 325E.21;

~~(iii)~~ (ii) To conduct hotel lien sales pursuant to section 327.06; and

~~(iv)~~ (iii) To conduct public auction sales of unclaimed

property pursuant to sections 345.04 and 345.05.

(d) To arrest any individual who, in the deputy constable's presence, commits a violation of the intoxicating liquor act, chapter 340;

(e) To provide general administrative or clerical assistance to county sheriffs, local police departments or constables; and

(f) To provide traffic or crowd control assistance to county sheriffs, local police departments or constables.

Sec. 135. [REPEALER.]

Minnesota Statutes 1980, Sections 301.01; 301.02 301.03; 301.04; 301.05; 301.06; 301.07; 301.071; 301.08; 301.09; 301.095; 301.10; 301.11; 301.12; 301.13; 301.14; 301.15; 301.16; 301.17; 301.18; 301.19; 301.20; 301.21; 301.22; 301.23; 301.24; 301.25; 301.26; 301.27; 301.28; 301.29; 301.30; 301.31; 301.32; 301.33; 301.34; 301.35; 301.36; 301.37; 301.371; 301.38; 301.39; 301.40; 301.41; 301.42; 301.421; 301.43; 301.44; 301.45; 301.46; 301.47; 301.48; 301.49; 301.50; 301.51; 301.511; 301.52; 301.53; 301.54; 301.55; 301.56; 301.57; 301.58; 301.59; 301.60; 301.61; 301.62; 301.63; 301.64; 301.65; 301.66; and 301.67 are repealed.

Sec. 136. [APPROPRIATION.]

The sum of $..... is appropriated from the general fund to the secretary of state to carry out the additional duties imposed by this act as indicated in this section, to be available for the fiscal year ending June 30 in the years indicated.

	1982	1983
(a) Preparation, mailing, and filing of annual reports	$.....	$.....
(b) Other duties	$.....	$.....

Sec. 137. [EFFECTIVE DATES.]

Sections 1 to 124, 126 to 133, and 136 are effective July 1, 1981. Sections 125, 134, and 135 are effective January 1, 1983.