Spring 1984

1983 Amendments to the New Mexico Business Corporation Act and Related Statutes

Janet G. Perelson

James C. Compton

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol14/iss2/5

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
I. INTRODUCTION

The dramatic increase in business activity in New Mexico in the last decade has had a predictable impact on the State Corporation Commission ("Commission") and on the Commission's Corporation and Franchise Tax Department ("Department"). As the volume of filed documents increased, the timeliness of processing decreased. For example, during the period from July 1, 1980 through May 6, 1981, the Department issued and filed 5,115 charter documents and received 25,000 annual corporate reports and franchise tax reports. During the same period, the Department received a daily average of twenty-five letters and 250 to 300 telephone inquiries concerning the status of corporations, the payment of franchise taxes and penalties, the availability of corporate names, the requirements for incorporation in New Mexico, and other related matters. The time between the date documents were filed and the date they actually were processed stretched to weeks.

The increased burden on the Department to handle documents and information requests reduced the Department's ability to enforce the franchise tax laws. Of the approximately 45,000 profit and nonprofit corporations registered in New Mexico in July, 1981, 6,000 to 7,000 were delinquent in the payment of their franchise taxes. Although New Mexico law requires cancellation of a corporation's charter if franchise taxes are not paid when due, only three hearings on cancellations were held in 1980, and none was held in the first half of 1981.

*Attorney, associated with Schwartz, Davenport & Schwendimann, Santa Fe, New Mexico; Member, New Mexico Bar, Rhode Island Bar, United States District Court for the District of Rhode Island.

**Attorney, Sutin, Thayer & Browne P.C. Santa Fe, New Mexico; Member, New Mexico Bar; Chairman, 1982 Ad Hoc Committee of Attorneys and Accountants Reviewing the Corporation Department. Some of the material included in this article was presented in part by James C. Compton at a Review of the Corporation Act seminar presented on June 17, 1983, by the Continuing Legal Education of the State Bar of New Mexico and the Corporation, Business, and Banking Law Section.

1. N.M. Dep't of Finance and Administration, A Management Assessment of the State Corporation Commission 59 (July 1981) (unpublished report) [hereinafter cited as Management Assessment]. The report may be obtained from the Department of Finance and Administration.
2. Id.
3. Id. at 62-66.
4. Id. at 62.
5. Id.
7. Management Assessment, supra note 1, at 62.
In the summer of 1982, the Chairman of the New Mexico State Bar’s Section on Corporation, Banking, and Business Law appointed an ad hoc committee of New Mexico attorneys and accountants to review the Department’s operations. The committee identified two goals for the Department as a result of that review: (1) to streamline Department procedures in order to speed processing of documents without necessarily increasing the number of Department personnel and (2) to encourage voluntary compliance with reporting and franchise tax requirements. The ad hoc committee presented its initial recommendations to the Legislative Finance Committee. The ad hoc committee also suggested the adoption of several recommendations from the American Bar Association’s Committee on Corporate Laws, which has been engaged in a continuing project to revise and modernize the Model Business Corporation Act. The 1983 New Mexico Legislature adopted many of the ad hoc committee’s recommendations, including many of the amendments to the Model Business Corporation Act which were suggested by the Committee on Corporate Laws, and made other substantial changes in New Mexico’s corporate laws.

This article discusses only those new laws which relate to the statutes compiled in chapter 53 of the New Mexico Statutes Annotated. For purposes of this article, discussion of the new Act is divided into four

8. The members of the Committee were:
   Richard K. Barlow, Esq.
   John P. Burton, Esq.
   Larry A. Chavez, CPA
   James C. Compton, Esq.
   James R. Follingstad, CPA
   John R. Howard, CPA
   Paul Jones, CPA
   Lindsay Lovejoy, Esq.
   Carrie L. Parker, Esq.
   James M. Parker, Esq.
   Manuel J. Rodriguez, Esq.
   Alison K. Schuler, Esq.
   Douglas D. Smith, CPA


10. Id.


major categories: domestic profit corporations, foreign profit corporations, nonprofit corporations, and professional corporations. The most significant amendments relate to domestic profit corporations. The amendments concerning domestic profit corporations affect many subjects, including the nature of shares, shareholder rights, and corporate management. Other amendments affecting administrative matters include changes in corporate reporting, filing of documents, and payment of fees.

II. DOMESTIC PROFIT CORPORATIONS

A. Changes Affecting Shares and Shareholders

1. Capital Structure and Limitation on Distributions

The 1983 amendments significantly changed the statutory concepts of par value and stated capital. These concepts originally were developed to protect creditors and senior security holders from improper distribution of corporate assets to shareholders. Corporate laws initially sought to achieve this goal by prohibiting corporations from incurring any debt greater than the amount of the value of the corporation’s capital stock. The rationale underlying this restriction was to assure that a corporation continued to possess sufficient assets to pay its debts during its entire existence.

This restriction on a corporation’s ability to borrow needed funds, however, created an unreasonable burden upon corporations seeking to

18. Id. §§ 53-5-9, 53-8-88.1, 53-11-50.
19. Id. §§ 53-2-1, 53-8-69, 53-17-6.
20. Id. §§ 53-2-1, 53-8-85.
21. Stated capital was defined in N.M. Stat. Ann. § 53-11-2(J) (1978) as the sum of:
   (1) the par value of all shares of the corporation having a par value that have been issued;
   (2) the amount of the consideration received by the corporation for all shares of the corporation without par value that have been issued, except such part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law; and
   (3) such amounts not included in Paragraphs (1) and (2) of this subsection as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as have been effected in a manner permitted by law. Irrespective of the manner of designation thereof by the laws under which a foreign corporation is organized, the stated capital of a foreign corporation shall be determined on the same basis in the same manner as the stated capital of a domestic corporation.
23. Section 429 Compiled Laws 1897. See Rankin v. Southwest Brewery and Ice Company, 12 N.M. 52, 73 P. 612 (1893) for a discussion of Section 429.
raise capital. In 1905, the Legislature repealed the restriction.\textsuperscript{24} Subsequently, the Legislature enacted a requirement that a corporation receive at least par value for shares issued.\textsuperscript{25} Additionally, the Legislature enacted various statutory provisions which limited a corporation’s ability to pay dividends\textsuperscript{26} and make distributions\textsuperscript{27} to its shareholders. Specifically, a corporation was prohibited from paying dividends to its shareholders if (1) it was insolvent, (2) if it would be rendered insolvent, or (3) if the dividend was paid from a source other than from unrestricted earned surplus.\textsuperscript{28} A corporation also was prohibited from making other distributions, such as a redemption or a partial liquidation, if (1) it was insolvent, (2) if it would be rendered insolvent, or (3) if the distribution was paid from a source other than earned surplus or, under certain circumstances, from capital surplus.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} 1905 N.M. Laws ch. 134.
\item \textsuperscript{26} \textit{Id.} § 53-11-44.
\item \textsuperscript{27} \textit{Id.} § 53-11-45.
\item \textsuperscript{28} \textit{Id.} § 53-11-44.
\item \textsuperscript{29} The provision on distributions specifically states:
\begin{enumerate}
\item A. The board of directors of a corporation may, from time to time, distribute to its shareholders out of capital surplus of the corporation a portion of its assets, in cash or property, subject to the following provisions: (1) no such distribution shall be made at a time when the corporation is insolvent or when the distribution would render the corporation insolvent; (2) no such distribution shall be made unless the articles of incorporation so provide or the distribution is authorized by the affirmative vote of the holders of a majority of the outstanding shares of each class whether or not entitled to vote thereon by the provisions of the articles of incorporation of the corporations; (3) no such distribution shall be made to the holders of any class of shares unless all cumulative dividends accrued on all preferred or special classes of shares entitled to preferential dividends have been fully paid; (4) no such distribution shall be made to the holders of any class of shares which would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in event of involuntary liquidation to the holders of shares having preferential rights to the assets of the corporation in the event of liquidation; (5) no such distribution shall be made out of capital surplus arising from unrealized appreciation of assets or re-evaluation surplus; and (6) each such distribution, when made, shall be identified as a distribution from capital surplus and the amount per share disclosed to the shareholders receiving it concurrently with the distribution thereof.
\item B. The board of directors of a corporation may also, from time to time, distribute to the holders of its outstanding shares having a cumulative preferential right to receive dividends, in discharge of their cumulative dividend rights, dividends payable in cash out of the capital surplus of the corporation, if at the time the corporation has no earned surplus and is not insolvent and would not thereby be rendered insolvent. Each distribution, when made, shall be identified as a payment of cumulative dividends out of capital surplus.
\end{enumerate}
\end{itemize}

\textit{Id.} § 53-11-45. Capital surplus meant the entire surplus of the corporation other than its earned surplus. \textit{Id.} § 53-11-2.

N.M. Stat. Ann. § 53-11-12 (1978) prohibited New Mexico corporations from increasing surplus by adding unrealized appreciation. The provisions of this statute represent an apparent rejection by the New Mexico Legislature of the practice in many jurisdictions of using unrealized appreciation
While these provisions restricted a corporation's ability to divert its assets to its shareholders at the expense of its creditors, these restrictions were not absolute. For example, a corporation could avoid many of the restrictions by issuing low par or no par stock, allocating most of the consideration to capital surplus, and then making a distribution to its shareholders from capital surplus. Therefore, the dividend and distribution restrictions provided only a minimal amount of protection to creditors, and provided no assurance that the corporation would have sufficient assets at all times to pay its debts. In fact, the changes recommended by the Committee on Corporate Laws acknowledged that the concepts of par value and legal capital do not serve their original purpose and may unnecessarily complicate corporate accounting without providing a comparable benefit.

a. Elimination of Par Value

The new Act deleted all references to par value. Par value no longer establishes the minimum consideration for which a corporation can issue shares. Under the new Act, corporations can use several different methods to determine the amount of consideration for the issuance of shares. The articles of incorporation may set the price or the manner in which the price will be determined, or the board of directors may, by resolution, establish a price, a minimum price, or a formula to determine a price. In any case, the primary limitation on directors' discretion to establish the consideration for the issued shares is the directors' responsibility not to dilute unfairly the value of any existing shares.

Implementation of the new Act's changes in the status of par value is simple for corporations organized after the effective date of the new Act. The new Act, however, does not clearly state the effect of a reference to par value in the articles of incorporation of corporations in existence before the new Act. The prudent course of action would be to assume that the provision in the articles is ineffective. The directors of these corporations then have two choices if they want to continue to use the amount designated as par value in the articles as the minimum consid-
eration. The board can adopt a resolution to establish that amount as minimum consideration. Alternatively, the corporation can amend its articles to eliminate the reference to par and to establish a minimum price or formula in the articles. Adoption of a resolution involves little or no expense and no filing requirement. The new Act does not require an amendment of the articles and there seems to be no reason to incur the expense of amending the articles unless there is another independent reason for an amendment.34

b. Limitations on Distributions

The former Act distinguished between dividends and distributions. A corporation could declare dividends from unrestricted earned surplus except when “the corporation [was] insolvent or when the payment thereof would render the corporation insolvent. . . .” In contrast, the former Act allowed distributions from earned surplus or capital surplus, except when the corporation was insolvent, would be rendered insolvent, or the distribution would be from capital surplus resulting from either unrealized appreciation or revaluation surplus. Insolvency was defined as the inability of a corporation to pay its debts as they came due, “the equitable insolvency” test.

The new Act applies the same rules to dividends and distributions even though technically they represent two separate methods of distributing corporate assets. “Distribution” is defined in the new Act to include any direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness, by a corporation to or for the benefit of any of its shareholders in respect of any of its shares, whether by dividend or by purchase redemption or other acquisition of its shares, or otherwise.

This definition recognizes that the rules governing a corporation’s ability to distribute its assets to its shareholders should be the same regardless of the form of the corporate distribution. Not only dividends, but also indirect transfers and partial or complete and voluntary or involuntary liquidations are to be governed by these rules. An indirect transfer could include, for example, the repurchase of parent company stock by a subsidiary whose actions are controlled by a parent, as well as other actions which are essentially similar to a typical dividend or stock repurchase.

34. See infra text accompanying notes 126-54.
36. Id. § 53-11-45. See supra note 29.
The Legislature correctly recognized that there is no reason to distinguish among these different types of distributions.39

The new Act also discarded the distinction between earned surplus and capital surplus as a basis for determining from what source a corporation could make distributions.40

The new Act forbids distributions if either:

(1) the corporation would be unable to pay its debts as they become due in the usual course of its business; or

(2) the corporation’s total assets would be less than the sum of its total liabilities and (unless the articles of incorporation otherwise permit) the maximum amount that then would be payable, in any liquidation, in respect of all outstanding shares having preferential rights in liquidation.41

Subsection (1) of the new Act establishes the “equity insolvency” test, which was also used in the former Act. Not only is a corporation prohibited from making distributions if it cannot pass the “equity insolvency” test, but it similarly is restrained if the corporation’s liabilities exceed its assets, even if the corporation could pay its debts as they become due.43 The second test is known as the “balance sheet” or the “bankruptcy insolvency” test.44

If the corporation passes the “equity insolvency” test, it still must satisfy the “balance sheet” test. The “balance sheet” test is new and may be based on financial statements prepared according to reasonable accounting principles, on a fair valuation or other reasonable method.45 The new Act does not require the use of generally accepted accounting principles, and corporations need not use certified public accountants in preparing their financial records.46 Therefore, if the “balance sheet” test is used, the board has considerable flexibility to determine the corporation’s assets and liabilities and their respective values.47 The utilization of accountants and generally accepted accounting principles, however, would tend to make the financial statements more standard and perhaps more comprehensible to shareholders and creditors. For purposes of enforcing

41. Id. § 53-11-44(A)(1), (2). Compare Cal. Corp. Code §§ 500 to 510 (West 1977), which provide different financial tests.
43. Id. § 55-11-44(A)(2).
44. Manning, supra note 21, at 59-64.
47. The allowance of valuing assets based on any reasonable method appears to have revised the previous Act’s prohibition on the use of unrealized appreciation. Presumptively, a fair valuation of corporate assets could include unrealized appreciation.
this section, the courts may have to determine what is a fair valuation or what methods of valuation are reasonable.

If the purpose for restrictions on distributions is the protection of creditors, then the utility of adding the "balance sheet" test is not clear because that test focuses on a liquidation situation, rather than on the liquidity of the corporation. The usual creditor is concerned, in contrast, with the corporation's ability to pay its debts in the ordinary course of business. 48

The former Act did not specify the date for testing the validity of a distribution. The new Act establishes the time for testing the validity of a distribution. 49 In the case of a purchase, redemption, or other acquisition of a corporation's shares, the effect of a distribution is tested as of the earlier date the corporation transfers money or other property or incurs debt, or the date the shareholder ceases to be a shareholder of the corporation with respect to the shares. 50 In all other cases, for example dividends and stock bonuses, the effect of a distribution is tested as of the date the distribution is authorized, or paid, if payment occurs more than 120 days following the authorization. 51 The new Act should assist both the corporation and any person interested in challenging the propriety of a distribution to determine the appropriate date for testing the validity of the distribution.

c. Elimination of Treasury Shares

The new Act eliminates the former statutory concept of treasury shares, that is, shares which are issued but not outstanding. 52 Previously, treasury shares could be sold without regard to par value and would be considered fully paid as long as the consideration was approved by the board of directors. 53 The former Act permitted a corporation to create and resell treasury shares without providing the same protection for existing shareholders and creditors as was provided when the corporation issued the shares. For example, the assets received for the sale of treasury shares were not required to be allocated to legal capital although assets received for the issuance of shares were required to be so allocated. Under the new Act, transactions by the corporation with respect to all of its shares are subject to the rules and tests concerning permissibility of distributions. 54

48. Manning, supra note 21, at 63.
50. Id.
51. Id. § 53-11-44.
54. Id. § 53-11-18 (Repl. Pamp. 1983).
Under the new Act, shares of the corporation acquired by the corporation become authorized but unissued shares without further action. If the articles prohibit reissuance, the number of authorized shares is deemed to be reduced by the number of reacquired shares. A corporation which has reduced the number of its authorized shares must file a statement of reduction on or before the date of its next corporate report in order to maintain an accurate public record of the actual number of authorized shares.

The absence of treasury shares may cause some concern to attorneys and accountants who are comfortable with the customary practice of obtaining a security interest in treasury shares as collateral to secure payment of a debt of the corporation with respect to a redemption. Other adequate security arrangements, however, still exist to secure payment of such debts arising under the new Act. For example, the reacquired shares can be held before transfer to the corporation by a neutral escrow agent to perfect the selling shareholder’s security interest. The escrow agent votes the shares pursuant to the seller’s proxy until payment or default. Some transactions, such as redemption of shares secured by a security interest in treasury shares, are predicated upon the existence of treasury shares. The effect of the new Act’s abolition of treasury shares on such transactions is not clear. As a practical matter, corporations probably will continue to honor existing agreements involving treasury shares and will continue to keep records of treasury shares on the books until the corporations complete the transition to a new system.

2. Uncertificated Shares

Under the former Act, a corporation was required to represent its shares by a certificate, a piece of paper with printed information about the corporation, the shareholders, the shares, and the transfer of the shares. The certificate occasionally cannot be located when the shareholder wants to transfer the shares. The absence or unavailability of the certificate becomes a logistical problem for large public corporations and for smaller corporations which have shareholders residing in diverse locations.

The new Act begins to address these recordkeeping problems by permitting corporations to issue uncertificated shares in addition to shares represented by certificates. This dramatic departure from former law is a recognition of the growing public acceptance of other certificateless systems such as brokerage accounts, independent securities depositories, and mutual funds. Uncertificated shares are particularly attractive to public

55. *Id.* § 53-11-5(A).
56. *Id.* § 53-11-5(B).
57. *Id.* § 53-11-23 (1978).
58. *Id.* § 53-11-23 (Repl. Pamp. 1983).
corporations with very active trading among large numbers of shareholders. The majority of New Mexico corporations are not publicly held and are less likely to benefit from uncertificated shares. These corporations need not be concerned about the change because the existence of uncertificated shares will have no impact on corporations which do not wish to use the system. The new law will provide recordkeeping flexibility for corporations which desire such an option.

Subject to restrictions in the articles of incorporation, the board of directors may provide, by resolution, that some or all of any or all classes, series, or fractional shares will be uncertificated shares. This provision means that the shares will not be represented by a certificate. Instead, the shares will be reflected by some notation in the corporate records or in the records of the corporation’s transfer agent. Any resolution of the board permitting uncertificated shares will not apply to shares already represented by a certificate until the certificate is surrendered to the corporation. A corporation may not treat any shares for which a certificate is outstanding as uncertificated and transferable on its books without due presentation of a certificate. The new Act permits no distinction between the rights and obligations of holders of certificated and uncertificated shares.

Share balances of the holders of uncertificated shares can be changed by any number of full or fractional shares merely by adjusting the records of the corporation or the transfer agent. For that reason, changes in the holdings of uncertificated shareholders resulting from stock dividends, mergers, or recapitalizations probably will be handled by adjusting the corporate records. The new Act permits, but does not require, the issuance of uncertificated fractional shares, even to holders of certificated shares, as an alternative to the issuance of either scrip or certificates for fractional shares. Fractional share certificates, as provided under the former law, and uncertificated fractional shares authorized under the new Act, must carry voting, dividend, and liquidation rights.

Purchasers of uncertificated shares are entitled to receive written notice of the name of the person to whom the shares are issued, the number and class of shares, and the designation of each series. There is no

59. Id. §§ 53-11-23(E) and 53-11-24.
60. Id. Compare Cal. Corp. Code § 416 (West 1977), which permits only corporations which are issuers of securities registered under the United States Securities Exchange Act of 1934 to adopt an approved certificated system.
62. Id.
63. Id.
64. Id. § 53-11-24(A)(4).
65. Id. § 53-11-24(B).
66. Id. § 53-11-23(E).
statutory requirement for delivering this information to purchasers of uncertificated shares prior to purchase, but these purchasers should make adequate independent investigation of this information before closing any stock purchase.

The former Act did not include any rules with respect to the issuance, transfer, or registration of certificates. For this reason, no comparable rules for uncertificated shares are included in the new Act. In all likelihood, the responsibility for registering restrictions and perfecting security interests ultimately will rest with the corporation’s transfer agent. In addition to the usual stop orders, transfer agents will need to develop for their share records a form of statement, affidavit, or certificate concerning the transfer and subsequent ownership of uncertificated shares. New Mexico might consider a new statute or amendment of existing statutes, such as Article 8 of the Uniform Commercial Code, to provide a framework for transactions in uncertificated shares similar to the existing system for certificated shares.

3. Signatures on Stock Certificates

Previously, only the president or vice-president and the secretary or assistant secretary could sign the corporation’s stock certificates. Transfers or issuance could be delayed when those officers were unavailable. The alternative use of transfer agents is not always practical for small corporations. The new Act also permits the chairman or vice-chairman of the board of directors and the treasurer or assistant treasurer to sign stock certificates. The president and secretary may continue to sign certificates under the new Act.

The new Act also permits all signatures on the stock certificate to be facsimiles rather than original signatures. This change acknowledges that a purchaser of shares rarely will be in a position to determine whether a manual signature on a stock certificate is an authorized signature of a corporate officer, the transfer agent, or the registrar.

---

67. Id. § 53-11-23 (1978).
68. A stop order is a direction by a customer to his broker to close trade at a named price which is above or below the current market price. Black’s Law Dictionary 1273 (rev. 5th ed. 1979).
71. Id. § 53-11-23(A) (Repl. Pamp. 1983).
72. Id.
73. Id.
signatures will permit the corporation to eliminate the time and effort often required to obtain manual signatures.

4. Changes in Shareholder Voting Requirements

The new Act affords corporate directors greater flexibility in management by eliminating the need for shareholder approval of some transactions. This flexibility is especially desirable in large or public corporations where the cost of shareholder meetings to approve management proposals can be substantial. The justification for this change stems from the belief that when the proposed action does not affect the shareholders in a fundamental way, either by changing substantially the nature of the enterprise or by diluting shareholders’ interests, the action should not require shareholder approval. Similarly, this type of transaction does not establish a shareholder’s right to withdraw his capital contribution.

The new Act reduces the percentage of shares which must approve certain actions from two-thirds to a majority. Majority voting requirements apply, however, only to corporations which are formed after the effective date of the new Act, unless the articles of incorporation provide otherwise. Corporations in existence before the effective date can fit within the new majority voting provisions by amending their articles of incorporation with the approval of two-thirds of the shares. The dual system may create some confusion for practitioners and their clients; however retaining the two-thirds requirements for already existing corporations seems preferable to requiring all corporations, which existed before the effective date of the new Act, to amend the articles in order to protect minority shareholders. This change in voting requirements will accommodate the needs of public corporations with large numbers of shareholders while permitting close corporations, where two-thirds approval is desirable, to continue their traditional operations. Practitioners concerned with protection of minority shareholders of new corporations may want to suggest that the corporations adopt a provision in the articles to require a voting percentage greater than the minimum required in the new Act.

5. Rights of Dissenting Shareholders

Provisions permitting dissenting shareholders to attack or attempt to enjoin corporate action with which they disagree have hampered, in some

---

75. N.M. Stat. Ann. §§ 53-13-2(A), 53-14-3(D), 53-14-5 (Repl. Pamp. 1983). Eliminating the need for shareholder voting on these matters is important where even the use of proxies does not provide enough flexibility to management.
76. Id. § 53-15-3. See infra text accompanying notes 80-91.
78. Id. § 53-18-6.1.
79. Id.
80. Id. § 53-18-6.
cases, the ability of management to merge or consolidate with other businesses, expand into new areas, or change the relationships among shareholders. The new Act accommodates the competing rights of a dissenting shareholder to withdraw from the corporation at a fair price and the corporation’s desire to act without undue judicial interference. The new Act provides that a dissenting shareholder may obtain payment for his shares by making that right his sole recourse and by taking away any additional right to attack the action of the corporation, except if the action is unlawful or fraudulent. Therefore, the statute preserves the right of the majority of shareholders to direct the management of the corporation, while respecting the desire of the dissenting shareholders not to participate in the corporate action.

The term “shareholder” is defined in both the former Act and the new Act to mean “holder of record,” which is the person in whose name the stock is listed in the corporation’s records. Application of this definition to the provisions granting rights to dissenting shareholders might not permit some persons who own only beneficial interests in shares (but whose interests are not reflected in the corporation’s records because their shares are held in a street name) to enforce their own rights. The new Act, therefore, permits owners of shares held in a street name to assert expressly their own rights simply by obtaining the written consent of the record holder of the shares. Now shareholders may have the convenience of putting their shares in the name of their broker and still retain the right to file dissent from certain management proposals and derivative actions.

The former Act permitted any holder of record to dissent with respect to less than all of his shares. This provision led, in some cases, to

84. The Committee on Corporate Laws noted that former laws provided only a right of judicial appraisal and that, as a result, a dissenting shareholder was required to apply to a court for valuation of his shares. The new Act is designed to encourage negotiation and compromise without judicial intervention. The Business Lawyer, July, 1977, supra note 75, at 1855-57.
86. A street name is the name of a “recognized broker, dealer, or bank in whose name securities may be registered as a convenience for holding certificates and facilitating transfer.” Webster’s Third New International Dictionary 2259 (unabr. 1971).
88. For example, a broker who holds the shares of many individuals may dissent with respect to all the shares held by any one person, but no person can split his vote and dissent with respect to only a part of his own shares.
persons dissenting simply to speculate on a high purchase price for some of their shares, while still voting enough of their shares in favor of the action to permit the action to take place. The new Act precludes this type of voting. A holder of record may dissent with respect to less than all the shares registered in his name, but only if he dissents with respect to all the shares beneficially owned by any one person. The change appears to eliminate the possibility of sham dissenting for speculative purposes without unduly restricting the rights of persons who own shares registered in a street name.

The dissenting holder of shares represented by certificates must surrender the certificate to the corporation within twenty days after demanding payment for the shares, enabling the corporation to note the dissent on the certificate. In the case of uncertificated shares, however, the new Act devised another system for maintaining a record of the status of such shares. If there is a transfer of uncertificated shares for which payment is demanded or shares on which a notation has been made, then any new certificate issued thereafter must have a notation. A buyer of uncertificated shares, who will not receive a certificate, should investigate the shareholder records of the corporation to determine the seller’s rights.

6. Shareholder Access to Corporate Information

The new Act expands a shareholder’s right to obtain certain corporate financial information by providing access to at least a balance sheet and statement of income for each tax year, if the corporation prepares such financial statements for any other purpose. The former law required a corporation to provide only its most recent financial statement showing assets and liabilities and the results of its operations. While the new Act does not give shareholders a right to force the corporation to create financial statements for their benefit, it does give them a right to any existing financial information.

Under the former Act, only holders of record had a right to receive corporate financial information. This rule limited the access of beneficial owners holding shares registered in a broker’s name to this data. The owner could receive this information only if the broker, as the record

91. Id. § 53-15-4(H).
92. Id. This section appears to include the possibility that uncertificated shares could be reissued as certificated shares.
93. Id. § 53-11-50(D). See also Committee on Corporate Laws, Changes in the Model Business Corporation Act—Amendment to Require Sending Financial Statements to Shareholders, 33 The Business Lawyer 931 (January, 1978).
95. Id. § 53-11-50(B).
holder, requested it. The new Act provides a means by which a person who owns shares in a street name can obtain financial information. This provision requires the board of directors to adopt a resolution permitting a shareholder of record to certify that all or a portion of the shares held in the shareholder’s name are held for the account of one or more other persons.  

A broker, by making such a certification, may assist a person whose shares are held in a street name to obtain direct access to corporate financial information. The new Act permits a beneficial owner to be considered a holder of record for whatever purposes are permitted by the board. The corporation must specify by resolution what class of shareholder may make the certification and the purposes for which the certification can be made, as well as the form and information required and a record date for receipt of the notice.

7. Tax-free Stock Exchanges

The new Act simplifies the means by which a corporation can effect a direct exchange of its shares of stock for shares in another domestic corporation. Under the former Act, which only contemplated that the corporation could merge or consolidate, the acquiring corporation was required first to form a new subsidiary, second to merge the new subsidiary with the corporation to be acquired, and third to merge the subsidiary into the acquiring corporation. The new Act eliminates this often cumbersome procedure and permits corporations to take advantage of a tax-free stock exchange without excessive legal and other expenses.

B. Corporate Management

1. Indemnification of Directors, Officers, and Others

In 1983, the Legislature created a new section of the new Act which sets forth the types of expenses for which directors are eligible for reimbursement and the circumstances under which they may be paid. The new Act also provides that no indemnification can be made unless the requirements of the statute are met, regardless of provisions to the contrary in the corporation’s articles or by-laws. Existing corporate provisions

97. Id.
98. Id. §§ 53-13-13, 53-14-3 to -6. The new Act also expressly permits such mergers between domestic and foreign corporations. Id. § 53-14-7.
99. Id. §§ 53-14-1 to -7 (1978). If the exchange is performed under I.R.C. § 368(C) (1981), the result is a tax-free exchange. See Committee on Corporate Laws, Changes in the Model Business Corporation Act, 30 The Business Lawyer 991 (April, 1975).
101. Id. § 53-11-4.1(G).
with respect to indemnification will not be enforced to the extent they are inconsistent with either the new Act or with a limitation in the articles of the corporation.\(^{102}\)

In order to be eligible for indemnification or reimbursement, a director (or other person) must be able to prove three elements:

1. the person acted in good faith;
2. the person reasonably believed:
   (a) in the case of conduct in the person’s official capacity with the corporation, that the person’s conduct was in its best interests; and
   (b) in all other cases, that the person’s conduct was at least not opposed to its best interests; and
3. in the case of any criminal proceeding, the person had no reasonable cause to believe the person’s conduct was unlawful.\(^{103}\)

Under the former law, a corporation could indemnify officers and directors only if the director was not liable for negligence or misconduct in the performance of some duty to the corporation, and if the corporation’s articles or by-laws authorized indemnification.\(^{104}\)

Under the new Act, indemnification is mandatory, unless limited by the articles, if the three statutory tests are met and if the board of directors concludes that the director was wholly successful on the merits.\(^{105}\) A court also could determine that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, regardless of whether the director meets the necessary standard of conduct or is liable to the corporation because of improper personal gain.\(^{106}\)

After satisfying the same tests, an officer, employee, or agent of the corporation may be indemnified under the same circumstances as a director.\(^{107}\) In addition, the corporation may provide for additional indemnification of officers, employees, or agents in its articles of incorporation, by-laws, or by resolution or contract.\(^{108}\) The corporation should consider

---

102. Id.
103. Id. § 53-11-4.1(B)(1)-(3). Note that no indemnification is permitted if the director has been held liable to the corporation. Id.
104. Id. § 53-11-4 (1978).
106. N.M. Stat. Ann. § 53-11-4.1(D)(2)(b) (Repl. Pamp.1983). If the director is liable to the corporation because of improper gain, he will not be permitted to recover more than his expenses. Id.
2. New Standards of Care for Directors

In addition to the standard of care required in order for a director to be indemnified, the new Act sets forth other specific measures of a director's conduct. The director's duties must be performed in good faith, in a manner the director believes to be in the best interest of the corporation, and with such care as an ordinarily prudent person would use under similar circumstances in a like position.

In determining whether a director breached a duty of care, the former Act did not provide express standards. The former Act permitted a director to rely in the performance of his duties only on certain financial statements of the corporation or on written reports by a certified or registered public accountant. Under the new Act, a director expressly is permitted to rely on factual information, opinions, reports, or statements, if they are prepared or merely presented by an officer or employee of the corporation whom the director reasonably believes to be reliable and competent. The director also may rely on counsel, accountants, or other persons whom the director reasonably believes to be operating within their professional competence. Finally, a director may rely on a committee of the board on which the director does not serve if the director reasonably believes that the committee "merits confidence." In any case, the director will not be considered to be acting in good faith if the

director has knowledge which causes the director's reliance to be unwarranted. 118

A director who assents to any distribution which violates the new Act or any restrictions in the corporation's articles will be liable to the corporation jointly and severally with all other directors who assent, unless the director has satisfied the standard of care established in the new Act. 119 The director's liability is measured by the difference between the amount of distribution which was made and the amount of distribution which would have been permitted by law. 120 A director who is held liable for an improper distribution is entitled to contribution from the shareholders who received the distribution if they knew that the distribution was improper, 121 as well as from any other assenting director who did not meet the statutory standard of care. 122

A director who does not assent to an action taken by the corporation can register a dissenting opinion by having the dissent entered in the minutes of the meeting before adjournment, or by filing a written dissent with the secretary immediately after adjournment. 123 The statute does not expressly state that a director who does not register a dissent in any of the ways specified or who abstains will be deemed to have assented. 124 In order to protect themselves in the event the new Act is so interpreted, dissenting directors should strictly follow the statutory directions in order to avoid potential liability arising from improper corporate action.

3. Limitation on Authority of Committees

The former law permitted committees to exercise all the authority of the corporation, except for amending the articles or the by-laws, adopting a plan of merger, or recommending to the shareholders a dissolution or sale of the assets of the corporation other than in the ordinary course of business. 125 The new Act narrows the powers of committees by expressly forbidding a committee to take the following actions:

A. declare dividends or authorize distributions;
B. approve or recommend to shareholders actions or proposals required by this act to be approved by shareholders;
C. designate candidates for the office of director... or fill vacancies on the board of directors or any committee thereof;

121. Id. § 53-11-46(B).
122. Id. § 53-11-46(C).
123. Id. § 53-11-35(C).
124. Compare Cal. Corp. Code § 316(B) (West 1977), which provides that abstention will be deemed to be approval.
D. amend the bylaws;
E. approve a plan of merger not requiring shareholder approval;
F. authorize or approve reacquisition of shares . . . by the board; or
G. authorize or approve the issuance or sale of, or any contract to issue or sell, shares or designate the terms of a series of a class of shares, provided that the board of directors, having acted regarding general authorization for the issuance or sale of shares, or any contract therefor, and, in the case of a series, the designation thereof, may, pursuant to a general formula or method specified by the board of resolution or by adoption of a stock option or other plan, authorize the committee to fix the terms of any contract for the sale of the shares and to fix the terms upon which such shares may be issued or sold . . . .

The new Act therefore requires certain decisions to be made by the entire board and each director will be governed by the same standard of care with respect to these important actions.

C. Administrative Matters

1. Fees, Reports, Taxes, and Filing Procedures

In order to decrease the processing time of documents, the new Act no longer requires prior payment of franchise taxes in order to file articles of merger, consolidation, or exchange, articles of amendment, restated articles, articles of incorporation in reorganization proceedings, articles of merger of a subsidiary, a statement concerning the issuance of shares in preferred or special classes in series, or for the issuance of a certificate of good standing and compliance. Instead, a corporation need only pay the statutory filing fees payable at the time of filing. Franchise taxes will be collected by the Department and will be enforced under other provisions of the new Act.

In order to be consistent with the elimination of par value and stated capital, the Legislature revised language concerning certain filing fees. Filing fees no longer are based on the stated capital or par value of stock,

129. Id. § 53-13-8.
130. Id. § 53-14-5.
131. Id. § 53-14-6.
133. Id. §§ 53-3-17, 53-3-19.
but rather, on the number of authorized shares. At the same time, the statute increased the amount of the fees. The minimum fee for filing articles of incorporation, however, will permit a corporation to authorize as many as 500,000 shares, rather than the 50,000 which could be authorized with the same $50 fee under the former law.

In the past, the Department often attempted to accommodate attorneys, accountants, and others by reviewing and approving documents before they were filed. No statutory authority existed for this procedure, and the applicant was not legally entitled to rely on the Department’s opinion. Under the new Act, however, the Department is permitted to review and approve any documents before they actually are delivered to the Commission for filing. A corporation now can reduce or eliminate the possibility that the Department will reject a filing by obtaining the Department’s review of the material in advance of the required date of approval and delivery. This screening procedure is particularly helpful when timing of a filing is critical, such as for mergers which must occur simultaneously in several states and which must be approved by a particular date.

The Department also accommodated federal agencies, other state agencies, and trade organizations by summarizing, cataloging, and documenting public information about corporations doing business in New Mexico. Such tasks were often time-consuming and disruptive of the Department’s performance of its statutory functions. The Department seldom charged fees for the tasks requested. The new Act authorizes the Commission to establish a fee schedule, approved by the Department of Finance and Administration, for services requested by other persons, agencies, and entities. The fee may reduce the volume of requests and generate income for the Department which could be used as the basis of a request for an increased budget.

The annual franchise tax now is the greater of $15.00 or sixty cents per thousand dollars of the amount by which the total assets of the corporation exceed the total liabilities of the corporation. In order to take into account the Department’s new administrative procedures, the new Act requires payment of the initial franchise tax upon filing of the articles of incorporation or, in the case of a foreign corporation, upon the application for a certificate of authority.

135. Id. §§53-2-1(A)(1)-1(A)(4),(11)-(12), and 53-2-1(C).
137. Id. §53-2-1(A)(17).
138. Management Assessment, supra note 1, at 59.
140. All fees generated by the Department are deposited in the general fund and are not directly available for the use of the Department. N.M. Const. art. XI, § 6. Regardless of the amount collected, the Department is of course limited to the budget approved by the Legislature.
142. Id. §53-3-13(B).
Although the new Act continues the requirement of annual payment of franchise taxes, corporate reports are required to be filed only every other year, rather than every year.\textsuperscript{143} Specific procedures will be provided by Commission regulation for filing biannual reports.\textsuperscript{144} The required contents of the corporate report also were amended to reflect the new Act's abandonment of the concepts of stated or legal capital, capital stock, and treasury stock.\textsuperscript{145} Reducing the number of corporate reports filed during a single year was intended to allow the Department to increase its detection of corporations failing to comply with the statutory franchise tax obligation and to increase enforcement actions against such corporations, including cancellation of their right to do business in New Mexico. Corporations must continue to pay franchise taxes each year and presumably must file at least a short form return.\textsuperscript{146} Therefore, actual savings of time to the Department is hard to comprehend. A better method of solving the problem might have been simply to eliminate all but a biannual report.

The amendments increased the fees to $20.00 for filing a corporate report and $25.00 for issuance of a certificate of good standing and compliance.\textsuperscript{147} Consistent with the goal of encouraging compliance with the new Act, the penalty for failing to file corporate reports was increased from $10.00\textsuperscript{148} to $100.00.\textsuperscript{149} The Department will mail written notice of a failure to file a report to the corporation's registered agent and principal office. If the report is not filed and all fees, taxes, penalties, and interest are not paid within sixty days of that notice, the Department will cancel the corporation's certificate of incorporation.\textsuperscript{150} The enforcement provision for domestic New Mexico corporations now parallels the law previously governing foreign corporations.\textsuperscript{151} This amendment was necessary to provide a streamlined method to purge the records of the Commission of defunct corporations and other corporations not in compliance with the reporting and tax requirements of the new Act.

The new Act increased the statutory requirements for suspending a corporation in an effort to reduce the accumulation of inactive corporations. Formerly, a corporation could merely file a statement of suspension,

\begin{itemize}
  \item \textsuperscript{143} Compare id. § 53-5-2(A) (1978) with § 53-5-2(A) (Repl. Pamp. 1983).
  \item \textsuperscript{144} State Corporation Commission Proposed Regulation § 1.5-2(A):1-5. Available at the State Corporation Commission.
  \item \textsuperscript{146} State Corporation Commission Proposed Regulation § 1.3-13(A):1. Available at the State Corporation Commission.
  \item \textsuperscript{148} Id. § 53-5-7(A) (1978).
  \item \textsuperscript{149} Id. § 53-5-7(A) (Repl. Pamp. 1983).
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} N.M. Stat. Ann. § 53-5-7(B) (1978).
\end{itemize}
regardless of whether or not the corporation was in good standing.\textsuperscript{152} Once a corporation formally suspended its business, the corporation continued to exist on the Commission's list of inactive corporations even though the Department could not determine if the corporation was still in existence.\textsuperscript{153} Under the new Act, a corporation that is no longer engaged in active business must pay all applicable fees, franchise taxes, penalties, and interest before it can formally suspend its business.\textsuperscript{154} To provide a periodic check by the Department, the Act also requires a suspended corporation to file a statement of renewal of its suspension status every five years to avoid cancellation of its certificate of incorporation.\textsuperscript{155}

2. Effectiveness of Filing Certain Documents

The former law provided that corporate existence began on the date the Commission issued a certificate of incorporation.\textsuperscript{156} In practice, however, delays of weeks or months followed the filing of articles of incorporation before the Commission actually issued a certificate.\textsuperscript{157} The Commission also developed a practice of back-dating the certificate to the date of filing, rather than dating the certificate with the actual date on which it issued the certificate. Simultaneously, the Commission required the corporation's initial annual report to be filed within thirty days of the actual date the certificate was issued, regardless of the original filing date, the date on the certificate, or the statutory requirement that the certificate be filed within thirty days of the original filing date.\textsuperscript{158} The Commission's practice resulted in uncertainty about the actual date on which a corporation became legally effective and the required date for filing the first annual report.\textsuperscript{159}

The new Act provides that, unless the articles are disapproved by the Commission, corporate existence begins upon delivery of the articles of incorporation to the Department.\textsuperscript{160} “Delivery” means the date of hand delivery to the Department, not to the Commission, or, for material

\begin{itemize}
\item \textsuperscript{152} N.M. Stat. Ann. § 53-5-9 (1978). Only a corporation in good standing was permitted to dissolve. \textit{Id}. § 53-16-1(B) (1978). Another 1983 amendment to the Business Corporation Act (not suggested by the ad hoc committee) permits a corporation to file a statement of intent to dissolve without paying all fees and franchise taxes. \textit{Id}. § 53-16-4 (Repl. Pamp. 1983). The rules in § 53-16-1(B), however, were not affected by this amendment.
\item \textsuperscript{153} N.M. Stat. Ann. § 52-16-1(B) (1978). The former Act did not provide the Department with any way to check periodically on suspended corporations.
\item \textsuperscript{154} \textit{Id}. § 53-5-9(A) (Repl. Pamp. 1983).
\item \textsuperscript{155} \textit{Id}. § 53-5-9(B).
\item \textsuperscript{156} \textit{Id}. § 53-12-4 (1978).
\item \textsuperscript{157} Management Assessment, \textit{supra} note 1, at 65-66.
\item \textsuperscript{158} This practice was described in a letter from the Commission transmitting the certificate of incorporation to new corporations.
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} N.M. Stat. Ann. § 53-12-4 (Repl. Pamp. 1983).
\end{itemize}
marked to the Commission, on the date of postmark plus three days.\textsuperscript{161} The Commission's proposed regulations further clarify dates of delivery by express mail or express carrier services.\textsuperscript{162} In addition, articles of amendment, including articles filed in connection with a reorganization, merger, consolidation, or exchange, now may become effective when delivered or on any date within thirty days after delivery if stated in the articles.\textsuperscript{163} This change in the law should assist large, multi-state corporations which must coordinate filings in several states, persons who need to establish a particular effective date for tax or other purposes, and attorneys who must render an opinion about the effectiveness of a corporation's organization.

Under the new Act, the Commission must give written notice of its disapproval of any filing within fifteen working days after delivery to the Department.\textsuperscript{164} The former statutory deadline of ten days\textsuperscript{165} was unworkable given the Department's daily volume of filed material, and did not provide the Department with adequate time for review.\textsuperscript{166}

3. Corporate Name

In the past, processing documents for new corporations was slowed by the Department's occasional difficulty in determining whether a proposed name was confusingly similar to the name of an existing corporation.\textsuperscript{167} The new Act specifies that the corporate name must contain, as a separate word, one of the words "corporation," "company," "incorporated," "limited," or a separate abbreviation.\textsuperscript{168} Thus, "Newco" would not be a proper corporate name, but "Newco, Inc." and "New Co." would be proper names. In addition, the requirement for a distinguishing word will not be satisfied by the words listed above. For example, "New Co." will not be considered adequately distinguished from "New Corp." These changes should assist Department personnel in determining name availability and compliance, and should avoid some delay in processing.

III. FOREIGN PROFIT CORPORATIONS

Many of the new Act's changes in provisions concerning foreign profit corporations will reduce both the number of documents filed with the

\textsuperscript{161} Id. §§ 53-11-2(O), 53-8-2(L).
\textsuperscript{162} State Corporation Commission Proposed Regulation §§ 1.8-2(L), 1.11-2(O). Available at the State Corporation Commission.
\textsuperscript{165} Id. § 53-8-91 (1978).
\textsuperscript{166} Management Assessment, supra note 1, at 59.
\textsuperscript{167} Id.
Commission and the use of the Commission as a record center for corporations incorporated in other states. Under the new Act, for example, a foreign corporation is not required to file a certified copy of its articles of incorporation and all amendments, nor subsequent articles of amendment, in order to apply for a certificate of authority to do business in New Mexico. The public must obtain these documents from the corporation’s state of incorporation, unless the documents were filed in New Mexico under the former law.

Other changes in the law concerning foreign profit corporations equalize the treatment of domestic and foreign profit corporations. For example, an application for a certificate of authority becomes effective upon delivery, unless disapproved. References to a foreign corporation’s par value and stated capital were deleted from requirements for an application for a certificate of authority, corporate reporting, and for application for withdrawal.

IV. NONPROFIT CORPORATIONS

A. In General

The new Act furthers the modernization and streamlining of the Department by bringing the requirements and practices for nonprofit corporations into parity with those for domestic and foreign profit corporations. Corporate existence for nonprofit corporations begins when the articles of incorporation are delivered to the Commission, unless disapproved. The Commission has fifteen working days to review and deny approval of any documents submitted by a nonprofit corporation.

Any amendments to the articles of incorporation and articles of merger or consolidation are effective upon delivery. If the articles provide otherwise, however, the effective date may be any date within thirty days of delivery. A foreign nonprofit corporation no longer must file certified copies of its articles of incorporation and all amendments in order to apply to obtain a certificate of authority to transact affairs in New Mexico. Under the new Act, a nonprofit corporation also can obtain review and approval of documents before formal delivery to the Commission for a

169. Compare id. § 53-17-6(A) (1978) with id. § 53-17-6(A) (Repl. Pamp. 1983).
170. Id. § 53-17-6(A) (Repl. Pamp. 1983).
171. Id. § 53-17-8 (Repl. Pamp. 1983).
175. Id. §§ 53-8-33, 53-8-91 (Repl. Pamp. 1983).
176. Id. § 53-8-91(A).
177. Id. §§ 53-8-38(C) and 53-8-44(A).
178. Id. § 53-8-69.
fee of $50.00. A dormant nonprofit corporation has a right to suspend its affairs by filing a statement of suspension; previously this right was granted only to profit corporations.

In a somewhat unusual step, the new Act reduces the penalty for failure to file a nonprofit annual report from $50.00 to $10.00. In the past, a nonprofit corporation, which accumulated substantial penalties, might have preferred simply to file new articles of incorporation for a fee of $10.00 and transfer its assets and liabilities to the new corporation, rather than pay the $50.00 penalty for each late annual report. This procedure could result in a duplication of corporate entities for no beneficial purpose. The new Act encourages nonprofit corporations to file the late reports and pay the penalties at a lower rate. Nonprofit corporations must continue to file annual reports, however, rather than the biannual reports required of profit corporations.

B. Telephone Meetings of Directors

The new Act expressly provides that directors of a nonprofit corporation have authority to participate in a meeting of the board of directors by a conference telephone call or similar device. The profit corporation provisions of the former Act were amended in 1975 to provide this option to directors of profit corporations. The failure to enact a similar grant of authority in the statutes concerning nonprofit corporations led to the conclusion by attorneys that telephone conferences were not permissible for boards of directors of nonprofit corporations. The new Act eliminates this concern.

C. Procedure for Reservation of Name

Nonprofit corporations now may reserve the exclusive right to a corporate name. Apparently there was no valid reason for the distinction between profit and nonprofit corporations. This change will assist organizations which operate outside of, as well as within, New Mexico to establish and maintain a uniform identity.

---

179. Id. § 53-8-85(N).
180. Id. § 53-8-88.1.
181. Id.
182. Id. § 53-8-88.
183. Id. § 53-5-2.
184. Id.
V. PROFESSIONAL CORPORATIONS

In order to accommodate a professional shareholder's personal estate planning, and to permit a professional corporation to adopt tax-qualified employee pension plans, which might own stock in the professional corporation, the new Act amended the Professional Corporation Act to permit two additional entities to receive shares of stock of a professional corporation:

[A] revocable trust the grantor of which is such a duly licensed or authorized person, provided that the trust contains provisions that require the trustee, upon the grantor's death or disqualification to render the professional service for which the grantor was licensed or authorized, to dispose of the shares as otherwise provided in the Professional Corporation Act; and

[A] tax-qualified employee benefit plan established for the exclusive benefit of the professional corporation's employees, provided that the plan's trustee is required to dispose of the trust's shares as provided in the Professional Corporation Act before transfer or distribution of the shares to beneficiaries of or participants in the plan who are not duly licensed or authorized to render the professional service for which the corporation is organized.

This increased flexibility will assist professionals in providing for their dependents and for their own futures without offending the restrictions against permitting persons unauthorized to practice a profession from becoming a member of a professional corporation.

VI. CONCLUSION

While the new Act is a good beginning for reform of New Mexico's corporate law, the legislation enacted in 1983 did not solve every problem. Some provisions of the new Act solve some of the problems identified by the ad hoc committee by streamlining Department procedures and increasing the certainty of the effect and timeliness of filing. Other provisions, such as the annual payment of franchise taxes and the biannual filing of corporate reports, fall short of the reforms required to effect substantial improvements. The Act fails to provide definitions for some important terms such as fair value, reasonable accounting methods, fraudulent actions, and reasonable belief.

Moreover, there are numerous ambiguities in the provisions discussed in this article. For example, the reporting requirements and the status of existing treasury shares must be resolved, either by Commission regu-

188. Id. § 53-6-9.
189. Id. § 53-6-9(B), (C).
lations or by the courts. Unfortunately, the Legislature's failure to direct existing corporations as to how to implement the mandatory changes, such as elimination of par value, stated capital, and treasury shares, may result in a failure by many corporations to operate under the new law, at least until the Legislature or the courts clarify these ambiguities. Additionally, the new Act may require reconsideration of other New Mexico laws, such as the Nonprofit Corporation Act,190 the Professional Corporation Act,191 and the Uniform Commercial Code.192 Legislation alone cannot solve all problems relating to the volume of documents processed by the Department; the solution also requires new management practices by the Commission such as computerization and better training.

We have not yet seen the significance of the new Act's attempted accommodations for large or publicly held corporations. Many of the changes are not mandatory, and most New Mexico corporations will not be affected by these changes unless they choose the new requirements. At best, the new Act will permit much greater operating flexibility for all corporations. Continued use of the new laws eventually will reveal whether the expected benefits outweigh the legislative problems created by so dramatic an alteration of New Mexico's longstanding and familiar corporate law.

190. Id. §§ 53-8-1 to -99.
191. Id. §§ 53-6-1 to -14.