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1975 AMENDMENTS TO THE
NEW MEXICO BUSINESS CORPORATIONS ACT
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INTRODUCTION

The New Mexico Business Corporation Act (hereafter NMBCA), enacted in 1967,1 was based on the 1966 version of the ABA Model Business Corporation Act2 (hereafter the Model Act). Since enactment of the NMBCA a number of substantive changes were made in the Model Act. The New Mexico State Bar appointed a committee in 1974 to revise and update the NMBCA.3 The committee sought to keep the NMBCA consistent with the Model Act to facilitate interpretation of the state corporation statutes by making case law of other states available for guidance.

However, certain of the new provisions vary substantially from those of the Model Act. The variations result largely from the obvious differences between New Mexico corporations and those of commercially important states such as New York and Massachusetts. There are few “public-issue” corporations organized under New Mexico law. Typically, New Mexico corporations are “close” corporations, either one-person or family enterprises, in which there is near identity between ownership of the corporation’s stock and its management.4 Accordingly, the thrust of the NMBCA is to provide a law generally suitable to close corporations but which leaves the organizers free to change any provision they deem unsuitable by an appropriate provision in the articles of incorporation.5

In light of the need for an explanation of the revisions and as an aid to their understanding, this article describes the rationale behind

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3. The Committee consisted of the following members: James C. Compton, Jr., Donald L. Jones and Charles I. Wellborn. The 1975 amendments became effective law on June 21, 1975.
5. One possible exception to this policy is that no change was made to § 51-24-32C, providing that cumulative voting will not exist without providing for it in the articles of incorporation. More often than not cumulative voting is desirable in a “close” corporation but the revisers were reluctant to reverse the result by amending the statute at this late date.
the changes made and behind some of those not made by the 1975 amendments to the NMBCA.

**SUBSTANTIVE PROVISIONS**

Revision of substantive provisions of the NMBCA affects corporate-director loans, use of corporate names, issuance of shares, consideration and payment for shares issued, and disposition of fractional shares. In addition, changes were made in shareholder preemptive rights, shareholder voting rights, voting trusts and agreements, and in the manner of calling shareholder meetings. Further revisions affect the board of directors' authority, their number and election, filling director vacancies, committee meetings, and director liability. Finally, a provision affecting a shareholder's right to bring derivative suits on behalf of the corporation was added, and a shareholder's right to inspect and examine corporate books and records was changed.

**Corporate Powers**

Unlike the 1966 version of the Model Act, the 1967 NMBCA permitted a corporation to make loans to its officers and directors. The 1969 version of the Model Act authorized a corporation to make loans to its employees and defined employees to include officers but not directors. The 1975 revision of the NMBCA did not adopt this change in the Model Act because, with loans to officers already permitted, these distinctions were unnecessary.

At common law, in the absence of a statutory prohibition, a

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15. Id. § 51-24-34, amending [1967] Laws of N.M., ch. 81, § 34.
17. Id. § 51-24-37, amending [1967] Laws of N.M., ch. 81, § 37.
20. Id. § 51-24-45.1.
22. N.M. Stat. Ann. § 51-24-4F (Supp. 1975) provides that a corporation has the power to "lend money to, and otherwise assist its employees, officers and directors... ."
24. Id. § 2(o).
corporate loan to a director was not inherently illegal. Of course, the loan had to be free from fraud and generally required the approval of disinterested directors. The Model Act’s prohibition against making corporate loans to directors is based on the premise that it is the best way to prevent abuses, particularly the diversion of corporate funds detrimental to the corporation, its shareholders and its creditors. The New Mexico committee considered the absolute prohibition against making loans to directors unduly restrictive, considering New Mexico’s proportionately large number of closely held or one-person corporations. Of course, such loans may still be specifically prohibited in the articles of incorporation or the bylaws if desired.

**Corporate Name**

The NMBCA provides that a corporation’s name cannot be “the same as” or “confusingly similar” to that of another domestic corporation, a foreign corporation authorized to transact business in this state or to a name previously reserved or registered pursuant to the New Mexico Act. While the New Mexico statute prohibits the use of a “confusingly similar” name, the Model Act prohibits the use of a “deceptively similar” name. The 1967 NMBCA rejected the “deceptively similar” language because it was considered too narrow to define the practice sought to be prevented. “Deceptively” implied that an intent to deceive might be required, whereas the use of a “confusingly similar” name is as harmful as the use of a “deceptively similar” one.

Two logical exceptions to the prohibition against use of similar corporate names were added to the statute by the 1975 revisions. Now a similar corporate name may be used where written consent has been given by the other corporation and at least one more word

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29. See Standard Oil Co. of New Mexico v. Standard Oil Co. of California, 56 F.2d 973 (N.M. 1932), where the court enjoined the Standard Oil Co. of New Mexico from using its name or any other corporate name using the words “Standard Oil Company” or other words similar in sound or appearance that would lead to confusion or uncertainty on the grounds that such a corporate name was confusingly similar to that of Standard Oil Company of California in violation of [1927] Laws of N.M., ch. 112, § 1, which prohibited a junior corporation from adopting a name confusingly similar to that of a senior corporation.
has been added to the name to make it distinguishable from the other corporate name.\textsuperscript{30} This exception had already been accepted in practice by the Corporation Department of the State Corporation Commission. The other exception permits use of a similar corporate name where a prior right to use of the name has been judicially established.\textsuperscript{31}

\textit{Regulation of Corporate Shares}

The 1975 amendments to the NMBCA made several revisions to the statutes regulating shares of a corporation. In general, the revisions affect authorization and issuance of shares, conversion of shares, consideration and payment for shares, and disposition of fractional shares.

A corporation may provide in its articles of incorporation for issuance of shares which are convertible into any other class or series of the same or any other class, except that shares may not be convertible into a class having prior or superior rights and preferences to dividends or to asset distribution upon liquidation.\textsuperscript{32} The circumstances under which a corporation may convert shares without par value into shares with par value were broadened in Section 51-24-14B(5).\textsuperscript{33} Prior to the amendment, shares without par value could only be converted into shares with par value if the part of the stated capital of the corporation representing the no par value shares was at least equal to the aggregate par value of the shares into which the no par shares were to be converted.\textsuperscript{34} The amendment provides that any deficiency in stated capital can be cured by a transfer to stated capital from either capital or earned surplus.\textsuperscript{35}

A corporation may also provide in its articles of incorporation for issuance of different series of shares of the same class of shares. Shares of the same class must be identical except that different series


\textsuperscript{32} Id. § 54-24-14B(5), amending [1967] Laws of N.M., ch. 81, § 14.

\textsuperscript{33} Id.


\textsuperscript{35} Id. "Surplus" is "the excess of the net assets of a corporation over its stated capital." "Net assets" means "the amount by which the total assets of a corporation, excluding treasury shares, exceed the total debts of a corporation. . . ." N.M. Stat. Ann. § 51-24-2K, 1 (Supp. 1975). However, neither the Model Act nor the NMBCA define "assets" or "debts." Thus, it is unclear whether certain intangibles should be included in a corporation's assets for the purposes of these definitions.
of the same class may vary in certain of their rights and preferences.36 The amendment permits a variation in the voting rights of different series of the same class.37 This change recognizes that variations in voting rights can be an effective means of allocating control in a close corporation and may also be significant in effecting certain types of mergers.

The statute governing the kind of consideration which may be given for shares was amended to include the conversion or exchange of indebtedness as well as the conversion or exchange of shares.38 Thus, either indebtedness or shares will constitute legal consideration when shares are either converted or exchanged pursuant to any merger, recapitalization or reorganization.39

Disposing of fractional shares was unnecessarily cumbersome under the prior version of section 51-24-23.40 The section was amended to provide two new alternatives for disposing of fractional shares or scrip convertible into full shares. In addition to issuing fractional shares or scrip, a corporation may pay cash for the fractional shares,41 or it may designate an agent to sell all fractional interests in the market and distribute the proceeds to the shareholders on a pro rata basis.42

Regulation of Shareholder Rights

The statutes affecting shareholder rights were amended in several important ways. The Model Act provides two versions of the pre-

36. [1967] Laws of N.M., ch. 81, § 15A provided that different series of the same class of shares may vary the following relative rights and preferences:
   (1) The rate of dividend;
   (2) Whether shares may be redeemed and, if so, the redemption price and the terms and conditions of redemption;
   (3) The amount payable upon shares in the event of voluntary and involuntary liquidation;
   (4) Sinking fund provisions, if any, for the redemption or purchase of shares;
   (5) The terms and conditions, if any, on which shares may be converted.


38. Id. § 51-24-17D, amending [1967] Laws of N.M., ch. 81, § 17. This section is now identical to § 18 of the Model Act.

39. Prior to the enactment of the NMBCA, indebtedness was recognized as valid consideration for the issuance of shares in New Mexico. See Morrison v. Crisp, 27 N.M. 380, 202 P. 123 (1921); Schreiber v. Armstrong, 70 N.M. 419, 374 P.2d 297 (1962).


emptive rights section. The version recommended by the ABA Committee on Corporate Laws provides that shareholders shall not have preemptive rights except to the extent provided for in the articles of incorporation. In contrast, in New Mexico preemptive rights are protected unless the articles of incorporation specifically provide otherwise. Furthermore, preemptive rights in New Mexico are not subject to all of the statutory exceptions set out in the alternate section of the Model Act.

The statute governing shareholder meetings was amended to conform with the Model Act provision. However, the New Mexico quorum statute continues to differ from the Model Act provision in that greater than majority voting requirements for shareholder action can only be imposed in the articles of incorporation, and not in the bylaws. The statute governing issuance of shares was amended to conform substantially to the Model Act provision by providing that the voting rights may vary between different series of a class of shares. However, the New Mexico statute provides that the failure of a trustee to comply with certain of the statutory provisions will not affect the validity of the agreement. Furthermore, the trustee is liable for any damage suffered because of a failure to comply.

The preemptive rights provisions differ substantially from those of the Model Act. The recommended version of the Model Act provides that shareholders do not have any preemptive rights unless they are specifically provided for in the articles of incorporation. The New Mexico statute reverses the presumption, providing that, except to the extent limited by the statute and the articles of incorporation, shareholders shall have preemptive rights. In small or closely-held corporations the preemptive right is a valuable right which permits the shareholder to protect his proportionate interest in control, profits and surplus. In larger corporations the preemptive right is not

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45. Model Bus. Corp. Act Ann. 2d § 26A.
47. Id. § 51-24-31.
51. Id.
52. Id. § 51-24-25, amending [1967] Laws of N.M., ch. 81, § 25.
likely to be as important, and providing these rights to shareholders becomes both difficult and expensive when the corporation seeks additional capital.\(^5\)\(^6\) Since relatively few public corporations are organized under New Mexico laws, it was felt that the preemptive right should exist unless some specific action is taken to limit it. It is a simple matter to limit or deny the preemptive right where it is desirable by so providing in the articles of incorporation.

There are three new statutory exceptions to the preemptive right. The first exception provides that the preemptive right does not extend to shareholders of any class that is preferred or limited as to dividends or assets.\(^5\)\(^6\) The second provides that common shareholders are not entitled to any preemptive right to shares of any class that is preferred or limited as to dividends or assets or to any obligations unless convertible into shares of common stock or carrying a right to subscribe to or acquire shares of common stock.\(^5\)\(^7\) The third denies holders of nonvoting stock the preemptive right to shares of voting stock.\(^5\)\(^8\) By implication, holders of voting stock and holders of nonvoting common stock will continue to have a preemptive right to acquire shares of nonvoting common stock.

Under the prior version of Section 51-24-25, shareholders had no preemptive rights where shares were issued to officers or employees of the corporation with the approval of a majority vote of the shares entitled to vote thereon.\(^5\)\(^9\) This preemptive rights exception was deleted from the statute because requiring mere majority shareholder approval for issuance of shares to officers or employees seriously jeopardizes the preemptive right of shareholders in a small or closely-held corporation. Of course, where such an exception to preemptive rights is desired, the corporation can provide one in its articles of incorporation.

The alternative preemptive right section of the Model Act, on which the NMBCA provision is based, provides that the preemptive right does not exist where shares were sold for other than cash.\(^6\)\(^0\) This exception was thought to be too broad because it might authorize denial of preemptive rights in situations where the issuance of shares other than for cash was specifically contrived to circumvent shareholders’ preemptive rights. At common law, under special cir-
cumstances, preemptive rights are sometimes denied where stock was issued other than for cash. However, since the case law did not establish quite so broad a principle as that suggested by the Model Act version, the exception was not included in the New Mexico statute.

Finally, subparagraph D of Section 51-24-25 was added to codify the common law rule that shareholders need be given only a fair and reasonable opportunity to exercise the preemptive right. What is a reasonable time depends on the circumstances of each case, but many lawyers believe that thirty days should be sufficient time to exercise the right under ordinary circumstances.

The power to alter, amend or repeal the bylaws or adopt new bylaws in New Mexico is vested in the board of directors unless the articles of incorporation provide otherwise. The Model Act gives shareholders a veto power over bylaws altered, amended, repealed or adopted by the board of directors by making such action subject to repeal or change by shareholder action. The revision of the New Mexico Act rejected the shareholder veto power provision. Other provisions of the Act give broad authority to the board of directors

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62. See e.g., Fuller v. Krogh, 15 Wis. 2d 412, 113 N.W. 2d 25 (1962) where the court held that preemptive rights could only be denied on the grounds of practical necessity. The court said:

> On principle, it would seem the preemptive right of a shareholder should not be denied when property is to be taken as consideration for the stock excepting in those peculiar circumstances when the corporation has great need for the particular property, and the issuance of the stock, therefore, is the only practical and feasible method by which the corporation can acquire it for the best interest of all the stockholders. (emphasis added.)

(113 N.W. 2d at 32.)
64. Id.
65. Von Slyke v. Norris, 159 Minn. 63, 198 N.W. 409, 412 (1924) (holding 60 days sufficient under all circumstances); Bennett v. Baum, 90 Neb. 320, 133 N.W. 439, 444 (1911) (holding five days not a reasonable time to allow existing holders to subscribe). Cf. Gord v. Iowana Farms Milk Co., 245 Iowa 1, 60 N.W. 2d 820, 830 (1953) (holding 16 months was timely where stockholder who had been fraudulently induced to sign waiver of preemptive rights demanded to exercise rights immediately upon learning the true situation).
66. N.M. Stat. Ann. § 51-24-26 (Supp. 1975). The extent of this power is illustrated by Jennings v. Ruidoso Racing Ass'n, 79 N.M. 144, 441 P.2d 42 (1968), where the court held that under a prior similar statute, [1927] Laws of N.M., ch. 112, § 8, repealed by [1967] Laws of N.M., ch. 81, § 135, the action of a board of directors in entering into an employment contract "modified in its legal effect all inconsistent bylaws and prevail[ed] over them" where a contrary bylaw had not been adopted by the stockholders. Id. at 149, 441 P.2d at 47.
in managing the corporation. This grant of broad authority appeared inconsistent with giving shareholders veto power over bylaws. Of course, if such veto power is desired, the articles of incorporation may so provide, although it should be remembered that a simple majority of the shareholders can remove directors without cause at any time.\textsuperscript{6,8}

The shareholder meeting statute was changed to permit flexibility in determining the time and place of the annual shareholders' meeting and the persons who may call it. The bylaws need only prescribe the manner in which the board of directors should determine the time and place of the annual meeting.\textsuperscript{6,9} Therefore, it is no longer necessary for the bylaws to prescribe a specific time and place for the annual shareholders' meeting.

The statute was also amended to provide that if the annual meeting is not held within any thirteen-month period, a shareholder may obtain a court order to require that the annual shareholder meeting be held.\textsuperscript{6,9,10} The abuse sought to be prevented is officers and directors perpetuating their terms in office by failing to call the annual shareholders meeting. Accordingly, the amendment deleted from Section 51-24-27 the sentence which provided that failure to hold the annual meeting at the designated time will not work a forfeiture or dissolution of the corporation.

The New Mexico statute governing voting requirements for shareholder action provides that a greater than majority voting requirement can be imposed by a provision in the articles of incorporation.\textsuperscript{7,11} The Model Act permits imposition of a greater than majority voting requirement by enactment of a provision in either the articles of incorporation or the bylaws.\textsuperscript{7,2} Since shareholders of New Mexico corporations do not have veto power over bylaw action taken by the board of directors,\textsuperscript{7,3} it was felt that the bylaws should be the vehicle by which greater than majority voting requirements can be required for shareholder action. Therefore, no change was made in this section of the New Mexico Act.

The statute regulating voting of shares was amended to permit multiple votes per share,\textsuperscript{7,4} a device of particular usefulness in allo-


\textsuperscript{69.} Id. § 51-24-27, amending [1967] Laws of N.M., ch. 81, § 27.

\textsuperscript{70.} Id. § 51-24-27B, amending [1967] Laws of N.M., ch. 81, § 27.

\textsuperscript{71.} Id. § 51-24-31.

\textsuperscript{72.} Model Bus. Corp. Act Ann.2d § 32.

\textsuperscript{73.} See notes 66, 67 supra and accompanying text.

cating control in a close corporation. In addition, former subpara-
graph F was changed to subparagraph C and the following
subparagraphs were relettered, conforming with the Model Act, thus
avoiding confusion.

The voting trust agreement provisions were revised to require the
trustee to follow more stringent procedures imported from the
Model Act which are set out in subparagraph A. In addition to the
provisions of the Model Act, subparagraph A was amended to
provide that failure of the trustee to keep or deposit the record as
required by subparagraph A will "not affect the validity of the agree-
ment or any action taken pursuant to it." This provision is con-
trary to the position of a majority of courts that voting trusts failing
to comply with the applicable statutory provisions are invalid, a
result thought to be unnecessarily harsh. The New Mexico statute
does provide, however, that a trustee who fails to keep or deposit the
record as required by this statute is liable to any holder of a voting
trust certificate who suffers damages from such failure.

Because of the frequent use of such agreements in closely-held
corporations, a new subparagraph B was added to make clear that
voting agreements which are not voting trusts are not subject to

75. Id. § 51-24-33, amending [1967] Laws of N.M., ch. 81, § 33.
§ 33.
78. See e.g., Abercrombie v. Davies, 130 A.2d 338 (Del. 1957), holding a stock pooling
agreement void where the stock had not been transferred to the name of the agent on the
corporation's books, and a copy of the agreement had not been filed at the corporation's
principal office; Smith v. Biggs Boiler Works, 32 Del. Ch. 147, 82 A.2d 372 (1951), holding
a voting trust agreement void where the affected shares were not deposited with the trustee;
State v. Keystone Life Ins. Co., 93 So.2d 565 (La. 1957) holding that the filing of a
photostatic copy of the text of the voting trust agreement without the signatures of the
subscribers failed to meet the statutory requirement of filing a duplicate copy of the
agreement in the office of the corporation, thereby rendering the agreement invalid. Cf. De
Marco v. Paramount Ice Corp., 102 N.Y.S.2d 692 (Sup. Ct. 1950) holding that the failure to
file a voting trust agreement with the corporation as required by the applicable statute did
not render the agreement invalid but only inoperative until the time of filing. Although the
failure to file or keep the record in accord with the statutory requirements will not render a
voting trust agreement void in New Mexico, there is authority that the violation of the other
statutory requirements will do so. For example, a voting trust agreement whose duration
exceeds the ten year limit will be void under the statute. See Perry v. Missouri-Kansas Pipe
§ 33.
80. Voting or pooling agreements have been distinguished from voting trusts on the
grounds that a shareholder who participates in a voting agreement may retain title to and
possession of his stock and the right to vote it although it must be voted in accordance with
the terms of the voting agreement. E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62
N.W.2d 288 (1954).
voting trust statutory regulations and are valid and specifically enforceable agreements.\textsuperscript{81}

\textbf{Regulation of Directors}

In many New Mexico closely-held corporations the shareholders actually manage the corporation, and board meetings are only formalities. The statute governing the board of directors was revised to legitimize this procedure by providing that any management can be performed by others than the board of directors by specifically providing for it in the articles of incorporation.\textsuperscript{82} The revision does not permit the corporation to be without a board of directors; it allows the authority of the board of directors to be diluted only to the extent the articles provide.\textsuperscript{83} In addition to its use in closely-held corporations, the procedure would also be appropriate in the management of wholly-owned subsidiary corporations by their parent corporations.

The statute governing the number and election of directors was amended to permit the corporation’s board of directors to have only one member.\textsuperscript{84} This revision recognizes that many New Mexico corporations are one-person corporations and that the previous statutory requirement of three directors often resulted in the election of two dummy directors who served no function.

The statute was also amended to allow the number of directors to be fixed in the articles of incorporation as well as in the bylaws.\textsuperscript{85} This change was made because of its importance as a device for allocating control among shareholders of close corporations.

A further amendment provided that changes in the number of directors may be made in a manner provided in the articles or bylaws as well as by amending the articles or bylaws themselves.\textsuperscript{86} Thus, in the absence of a provision in the articles or bylaws prohibiting it, the number of directors may be increased or decreased by a simple

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  \item \textsuperscript{82} Id. § 51-24-34, \textit{amending} [1967] Laws of N.M., ch. 81, § 34.
  \item \textsuperscript{83} As the Comment to § 35 of the Model Act points out, there are only four requirements governing the corporation’s board of directors. They are: "(1) the corporation must have a board of directors; (2) it must consist of one or more members; (3) it must manage the business and affairs of the corporation except as otherwise provided in the articles; and (4) the names and addresses of the members of the initial board must be stated in the articles." Model Bus. Corp. Act Ann.2d § 35, ¶ 2. The revised statute is in substantial conformity with § 35 of the Model Act.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id.
\end{itemize}
\end{footnotesize}
action of the board of directors, rather than by the more cumbersome procedure of amending the bylaws.8 7

Prior to the amendment of the statute governing vacancies on the board of directors, a vacancy created by an increase in the number of directors had to be filled by a shareholder election at the annual meeting or at a special meeting called for that purpose.8 8 This requirement was changed to permit the board of directors to fill the vacancy until the next election of directors by the shareholders.8 9 The previous restriction was abandoned because it did not effectively prevent abuse by the board of directors. It is unlikely that the expanded board could do any more than the board which favored the expansion could have done in the first place. Furthermore, shareholder power to remove directors without cause by majority vote checks the authority of the expanded board.9 0

The statute governing directors’ meetings was amended to provide that committee meetings are governed by the same rules as govern meetings of the entire board.9 1 The statute was further amended to permit conference telephone meetings when it is not possible for all directors to be physically present.9 2 A conference telephone meeting requires that all persons participating in the meeting be able to hear each other at the same time. Use of the conference telephone meeting can be restricted by the articles or bylaws.

The 1975 revision of the New Mexico Act eliminated several areas in which directors could be held personally liable for corporate acts. Prior to the revision, Section 51-24-45A(4) made directors liable for loans made to an officer or director of the corporation.9 3 This treatment was inconsistent with the provision permitting loans to officers and directors of the corporation.9 4 It made an unwary director who approved a statutorily permitted direct or indirect loan9 5 to an

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87. With these amendments the statute is now substantially similar to § 36 of the Model Act.
90. Id. § 51-24-38, amending [1967] Laws of N.M., ch. 81, § 38.
91. Id. § 51-24-41, amending [1967] Laws of N.M., ch. 81, § 41.
95. The subparagraph provided that any director who voted for or assented to a loan to an officer or director would be liable for the loan. The scope of the term “assent to” was defined to include the approval and ratification of a dividend declared by the executive
officer or director of the corporation the unwitting guarantor of its repayment. The section also made a director liable for any loans secured by shares of the corporation.\textsuperscript{96} The revisers felt that the latter provision did little more than encourage directors to make unsecured loans. Although the provision may have prevented directors from making an unlawful redemption of shares, the problem is more effectively dealt with by other provisions of the Act. Therefore, subparagraph A(4) was repealed.

Subparagraph A(5) made directors liable for any unpaid portion of the $1,000 that was required before a corporation could commence business.\textsuperscript{97} The idea that a minimum investment of $1,000 would provide some protection for creditors was considered illusory. Credit reports, not the existence of the corporation itself, determine the credit-worthiness of a corporation.\textsuperscript{98} Therefore, this subparagraph was eliminated.

\textit{Shareholder Actions}

Section 51-24-45.1, adopted in the 1975 revision, provides that a shareholder must have been a holder of record at the time of the action complained of to bring suit against the corporation.\textsuperscript{99} This provision is consistent with Rule 23 of the New Mexico Rules of Civil Procedure\textsuperscript{100} and with prior New Mexico case law.\textsuperscript{101} The committee in Aiken v. Insull, 122 F.2d 746 (7th Cir. 1941), \textit{cert. denied}, 315 U.S. 806 (1942). The word "assent" may allow directors to assert the defenses of good faith and due care. However, § 51-24-45B (§ 48 of the Model Act) provides that a director who is present at a meeting shall be conclusively presumed to have assented unless he takes the appropriate dissent action. But a director is still entitled to a good faith defense where he relied upon the books and financial records of the corporation. N.M. Stat. Ann. § 51-24-45C (Supp. 1975); Model Bus. Corp. Act Ann.2d § 48.

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  \item \textsuperscript{97} Id. § 51-24-45A(5), amending \textsuperscript{[1967]} Laws of N.M., ch. 81, § 45; Id. § 51-24-2A(7).
  \item \textsuperscript{98} See W. Cary, Corporations 863 (4th ed. 1969).
  \item \textsuperscript{100} Rule 23(b) differs from the NMBCA in that it does not require that the shareholders' interest appear of record. It provides the following: In an action brought to enforce a secondary right on the part of one [1] or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver that the plaintiff was a shareholder all the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law.
  \item \textsuperscript{101} Rankin v. Southwestern Brewery & Ice Co., 12 N.M. 54, 59, 73 P. 614 (1903) citing Hawes v. Oakland, 104 U.S. 450 (1881); Goldie v. Yaker, 78 N.M. 485, 432 P.2d 841 (1967) holding that a stockholder must be a stockholder at the time of the transaction complained of unless the wrong is continuing and has not been consummated although the wrong was commenced before the transfer of stock.
\end{itemize}
section also provides that the court may require the plaintiff in such an action to pay the reasonable expenses incurred by the defendant, including attorneys' fees, where the court finds that the action was brought without reasonable cause. This provision is intended to prevent shareholders from bringing unwarranted suits which are an expensive nuisance for the corporation. The section differs from the Model Act in that it does not require posting of security for expenses where the plaintiff holds less than five percent of the outstanding shares or shares having a market value of less than $25,000. This provision was considered too restrictive, especially where the shareholder's interest may not meet the minimum value because of the very action of which he is complaining.

Books and Records

The books and records section of the Act was revised in three ways. The revisions provide flexibility in the form of record keeping by allowing the corporation to keep its books, records and minutes in any form which is capable of being converted into written form within a reasonable time. The right to examine books and records is now limited to "relevant" books and records. Further, holders of voting trust certificates are given the same rights of examination that shareholders have.

FORMATION OF CORPORATIONS

Articles of Incorporation

Section 51-25-2 specifically sets out what information must be provided in the articles of incorporation. Under the previous version of Section 51-25-2, the articles of incorporation had to specify the purpose or purposes for which a corporation was formed. This is no longer necessary. The section was amended to permit an all-purpose statement in lieu of the enumeration of specific purposes. Former subparagraph A(7), which required a minimum initial capital investment of $1,000, was eliminated to conform with section

104. Id. § 51-24-48A.
105. Id. § 51-24-48B.
106. Id. § 51-24-48B, C, D.
Similarly, this requirement was eliminated from Section 51-25-5.  

In addition, the language of subparagraph A(7), formerly subparagraph A(8), was amended to add language consistent with the language adopted in the revision of the preemptive rights statute. Finally subparagraph C was added to the statute. An abbreviated version of former subparagraph A(9), it permits provisions regulating the internal affairs of a corporation to be included in the articles of incorporation. Such provisions are sometimes helpful in connection with shareholder agreements or other shareholder arrangements to allocate control of a close corporation.

Organizational Meeting

After the articles of incorporation have been filed, the board of directors is required to have an organization meeting to adopt bylaws, elect officers and transact any other necessary business. The prior statute required that this organization meeting be called by the incorporators. Under the revised statute, the organization meeting must now be called by a majority of the board of directors. This amendment eliminated the need for action by the incorporator, who is generally the lawyer or some other dummy. Other minor changes were made which were not intended to change the meaning of the section.

AMENDMENT OF ARTICLES OF INCORPORATION

Procedural Problems

Amendment of a corporation's articles of incorporation is governed by sections 51-26-1 to 51-26-13. Sometimes a corporation must amend its articles between the time they are filed and the issuance of shares. The prior version of the law had no provision for amendment except by shareholder vote. Therefore, shares had to be issued to have the vote necessary to adopt a proposed amend-
ment. Under the revised statute, if no shares have been issued the board of directors may amend the articles of incorporation by adopting a resolution to that effect without shareholder approval. Section 51-26-4C was amended to comport with this revision.

Another procedural problem arose under the prior statute when a director resigned or died after the articles of incorporation were filed but before the organizational meeting was held. It was unclear under the previous statute whether the remaining directors could fill the vacancy, and, if they could, what procedure had to be followed. The revision permits the board of directors to amend the articles of incorporation before the organizational meeting is held or shares are issued. Since there is no requirement that the amendment be made by the board of directors named in the articles of incorporation, the remaining members of the board can now fill vacant directorships by resolving to amend the articles of incorporation, substituting the names of the new directors.

Finally, the statute now allows restating the articles of incorporation at the time an amendment is made without subsequently refiling the articles so restated with the Corporation Commission. The section requires that the restatement specify that it differs from previous articles of incorporation only in the amendments adopted with it.

**Class Voting on Amendments**

Once shares have been issued the articles of incorporation may only be amended with shareholder approval. Shareholders of a class not otherwise entitled to vote retain the right to vote on certain amendments which might adversely affect the rights and privileges of holders of that class. Former subparagraph 51-26-3G provided that any class of shares had the right to vote if the amendment to the articles would "create a new class of shares having rights and preferences prior and superior to the shares of the class, or increase the rights and preferences of any class having rights and preferences prior or superior to the shares of the class." But former subparagraph G did not apply to an amendment to increase the number of authorized

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120. Id. § 51-26-2A, amending [1967] Laws of N.M., ch. 81, § 56.
121. Id. Compare id. § 51-26-7.
123. Id. § 51-26-3.
shares of a class having rights and preferences prior or superior to those of another class of shares. This loophole has been closed in the revised version of the statute.\textsuperscript{1}\textsuperscript{2}\textsuperscript{4}

**Restatement of Articles of Incorporation**

The articles of incorporation may be restated pursuant to Section 51-26-7.\textsuperscript{1}\textsuperscript{2}\textsuperscript{5} The prior version of this section required the approval of the board of directors and the shareholders.\textsuperscript{1}\textsuperscript{2}\textsuperscript{6} The revision omits the cumbersome and unnecessary requirement of shareholder approval.

**MERGERS AND CONSOLIDATIONS**

**Procedure for Merger**

Mergers and consolidations are governed by Sections 51-27-1 to 51-27-7.\textsuperscript{1}\textsuperscript{2}\textsuperscript{7} The procedure for merger was revised to permit a so-called "triangular merger."\textsuperscript{1}\textsuperscript{2}\textsuperscript{8} This type of merger occurs when the company being acquired is merged into a subsidiary corporation, but the exchange of securities is between the parent corporation and the company being acquired. Such a merger may be accomplished as a tax free reorganization pursuant to Section 368(a)(2)(E) of the Internal Revenue Code.\textsuperscript{1}\textsuperscript{2}\textsuperscript{9} The language of subparagraph 51-27-5A(2)\textsuperscript{1}\textsuperscript{3}\textsuperscript{0} was revised to be consistent with Section 51-27-2C.\textsuperscript{1}\textsuperscript{3}\textsuperscript{1}

**Merger of a Subsidiary Corporation**

Section 51-27-5 was amended to permit a short-form merger when one corporation owns at least ninety percent rather than ninety-five percent of stock in another corporation.\textsuperscript{1}\textsuperscript{3}\textsuperscript{2} A short-form merger is one which does not require shareholder approval of either corporation.\textsuperscript{1}\textsuperscript{3}\textsuperscript{3} The expanded privilege is desirable since it eliminates the formalities of an unnecessary shareholders' meeting. Appraisal rights are unaffected by use of this form of merger.\textsuperscript{1}\textsuperscript{3}\textsuperscript{4}

\textsuperscript{124.} Id. § 51-26-3G, amending [1967] Laws of N.M., ch. 81, § 57.
\textsuperscript{125.} Id. § 51-26-7.
\textsuperscript{131.} Id. § 51-27-2C, amending [1967] Laws of N.M., ch. 81, § 69.
\textsuperscript{132.} Id. § 51-27-5A, amending [1967] Laws of N.M., ch. 81, § 72.
\textsuperscript{133.} See 15 W. Fletcher, supra note 25, § 7046.1.
Shareholder Approval of Merger

Shareholder right to dissent, which is available in the event of merger, consolidation or sale of substantially all of a corporation's assets, has traditionally protected small minorities from overreaching by a majority. A dissenting shareholder has the right to require that the fair value of his shares be established and paid to him.\(^{135}\)

The ABA Committee on Corporate Laws apparently concluded that the pricing mechanism of the securities markets was an adequate gauge of the value of the shares involved and provided therefore in the 1969 version of the Model Act that a holder of shares listed on a national securities exchange has no right to dissent and appraisal.\(^{136}\)

This revision of the Model Act was not adopted in the New Mexico Act. On the basis of their observations of the activity in the securities market since 1969, the New Mexico revisers concluded that they did not share the confidence of the ABA Committee on Corporate Laws in the pricing mechanism of the securities markets. Therefore, the shareholders' right to dissent where their shares are listed on a national securities exchange was retained.

Dissolution of Corporations

Voluntary Dissolution by Incorporators

The prior version of the New Mexico Act permitted the incorporators of a corporation not formally organized to dissolve it within two years of the date of issuance of its certificate of incorporation.\(^{137}\) Beyond the two-year time limit, the corporation had to be completely outfitted with officers, directors and shareholders solely for the purpose of dissolving it. This procedural requirement resulted in perpetuating corporations which would never be formally organized. Therefore, the two-year time limitation was eliminated, and such corporations can now be dissolved by their incorporators at any time.\(^{138}\)

Procedure for Liquidation of Corporation by Court

The former version of the statute regulating corporate liquidation by a court provided that the court may appoint a receiver to collect the assets of the corporation including all amounts owed to the

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\(^{135}\) Id. § 51-28-3.


corporation by shareholders for unpaid share subscriptions. The unintended distinction between shareholders who owed the corporation for unpaid subscriptions and "subscribers," who are not yet shareholders was eliminated by amending the section to allow the receiver to collect from any person who is a "subscriber" for shares.

**Receiver Qualifications**

The former version of the statute establishing qualifications for receivers required that they be United States citizens or domestic or foreign corporations authorized to do business in the state. The statute was revised to remove the requirement that a qualified person be a United States citizen. It was believed that the requirement was needlessly restrictive without providing any particular protective value.

**FOREIGN CORPORATIONS**

**Admission of a Foreign Corporation**

Section 51-30-1 requires any foreign corporation transacting business within the state to qualify as a foreign corporation by obtaining a certificate of authority from the State Corporation Commission. However, a foreign corporation may engage in certain transactions without being required to qualify. Subparagraph G, which specified one of these exceptions, was rewritten to provide badly needed clarification. The subparagraph now clearly

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143. See In re Griffiths, 413 U.S. 717 (1973) indicating that such a qualification may also be unconstitutional. See also Note, Non-U.S. Citizenship—No Bar to the Bar, 12 Colum. J. Trans. L. 581 (1973).
145. While not all-inclusive, § 51-30-1 does provide a list of certain activities which do not constitute a business transaction within the state. Furthermore, the list only applies for the purposes of the NMBCA and does not apply, for example, for testing jurisdiction. Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).
147. Construing the confusing language in Cessna Finance Corp. v. Mesilla Valley Flying Serv., 81 N.M. 10, 462 P.2d 144 (1969), the court held that pursuant to former subparagraph G, a corporation was not transacting business within the state where its only business was to finance the purchase of airplanes to aid sales by its parent corporation.
establishes that banks and other financial institutions incorporated in other states may make loans in New Mexico without being required to qualify as foreign corporations. The amendment also makes it clear that the exception applies without regard to whether the foreign corporation which is a party to the transaction is a borrower or a lender.

**Corporate Name of a Foreign Corporation**

Like a domestic corporation, a foreign corporation cannot use the same name or one confusingly similar to the name of any domestic or foreign corporation qualified in the state. The 1975 amendments also allow a foreign corporation to adopt a fictitious name for its use in New Mexico. The statute regulating changing the name of a foreign corporation was reworded for consistency.

**ANNUAL CORPORATE REPORTS**

Section 51-21-2 requires a corporation to file an annual corporate report with the State Corporation Commission. Subparagraph C of this section was revised to permit any one of the officers or other agents of the corporation to sign the annual report. Thus, it is no longer necessary for the annual report to contain the signatures of both the president or vice president and the secretary, a cumbersome procedure thought to contribute at least to some extent to delinquent corporate reporting.

**FEES OF CORPORATION COMMISSION**

Section 51-12-1 was completely rewritten to simplify and clarify the filing fee structure and to make New Mexico fees commensurate with those charged by nearby states. The revision also attempts to relate the amount of the fee charged to the amount of work the filing created for the Corporation Commission.

The new fee for filing articles of incorporation and issuing certificates is consistent with the considerable cost imposed upon the Corporation Commission and other agencies in establishing initial

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150. Id. § 51-30-4, amending [1967] Laws of N.M., ch. 81, § 106.
152. Id.
154. N.M. Stat. Ann. § 51-12-1A(1) (Supp. 1975) establishes a fee of one dollar ($1.00) for each One Thousand Dollars ($1,000) of the total amount of capital stock authorized, but in no case can it be less than Fifty Dollars ($50).
record keeping for a newly incorporated firm. The fee charged reflects a balance between the state’s need to be compensated for services it provides and the small businessman’s demand that the fee not be so high that it unfairly restricts his ability to incorporate.

The provision for charging potentially greater fees for articles of amendment involving an increase in capitalization than for those in which there is no increase in capitalization was retained. Subparagraph A(14) was revised to make clear that when a foreign corporation increases the amount of its authorized capital stock, whether by merger or amendment, the filing fee is determined by the extent of its operation in the state and the magnitude of the increase.

In addition, the charge for certifying copies of any document now relates to the number of pages required to be examined in certifying the document. The fee of one dollar per page for copies of certified documents which the Corporation Commission is required to provide reflects clerical and other costs of reproduction.

CONCLUSION

Undoubtedly, members of the Bar (and the revisers in particular) hope that no further extensive revisions of the NMBCA will be required in the near future. In their report to the State Bar Legislative Committee dated May 20, 1975, however, they did express the need to review the possible enactment of statutes facilitating shareholder arrangements common to close corporations. Other changes may be made on the basis of experience in dealing with the revised Act.

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156. Id. § 51-12-1A(3).
157. Id. § 51-12-1A(14), amending [1969] Laws of N.M., ch. 22, § 1.
158. Id. § 51-12-1B, amending [1967] Laws of N.M., ch. 22, § 1.
159. Id.