OFFICIAL COMMENTS OF THE

ADVISORY COMMITTEE TO THE SECRETARY OF STATE

ON THE

ILLINOIS BUSINESS CORPORATION ACT OF 1983

SECTION 1.01. SHORT TITLE.

Section 1.01 adds to the name of the Act, "OF 1983", in order to emphasize the comprehensive nature of the revision of the 1933 Act. A new Business Corporation Act has been adopted.

SECTION 1.05. POWERS OF THE SECRETARY OF STATE.

This section makes no substantive change in §152 of the 1933 Act.

SECTION 1.10. FORMS, EXECUTION, ACKNOWLEDGMENT AND FILING.

This section combines §§144 and 151 of the 1933 Act. It also contains general provisions for executing and filing reports and issuing certificates by the Secretary of State and supersedes portions of §§9a, 12, 12a, 15, 48, 55, 55a, 56, 58, 58a, 59, 60a, 65, 66, 66a, 74, 75, 76, 79a, 79b, 79c, 80, 81, 82a, 92, 97, 98, 99, 104a, 106, 107, 110, 110a, 117, 119, 120,121 and 123 of the 1933 Act.

SECTION 1.15. STATEMENT OF CORRECTION.

This section permits a domestic or foreign corporation to correct any error or defect in any document previously filed with the Secretary of State and sets forth a procedure to do so; a statement of correction will not be a substitute for any required filings, the basis for determining fees and franchise taxes may be corrected by this statement, but a separate petition for adjustment or refund is to be required under §1.17. There was no provision in the 1933 Act for permitting the correction of reports. This section requires that a separate statement be filed for each erroneous report on file, but only the relevant portions of such reports need be restated. The 1933 Act contains no authorization to the Secretary of State to issue refunds even if a report disclosed erroneous information. A statement of correction under §1.15 of this Act is intended to provide the basis for a petition for refund or adjustment of fees under §1.17.

SECTION 1.17. REVIEW, REFUND AND APPEAL.

Within three years from the date a payment was due or was paid, a corporation may petition the Secretary of State for a reassessment or a refund of fees or taxes erroneously assessed or paid. If the amount in question is based on an erroneous report previously filed, a petitioner must also file a Statement of Correction (see §1.15 and comment thereunder). Whether an adjustment or refund shall be given is in the discretion of the Secretary of State. Such petition is subject to review under the Administrative Review Law with all final orders and judgments appealable as in other civil actions. The three year statute of limitations was adopted in order to give finality to tax payments at some date certain.

SECTION 1.20. CERTIFICATES AND CERTIFIED COPIES OF CERTAIN DOCUMENTS TO BE RECEIVED IN EVIDENCE.

This section makes no substantive change in §149 of the 1933 Act.

SECTION 1.25. LIST OF CORPORATIONS.

This section requires the Secretary of State to publish a list of corporations filing an annual report for the preceding year. Previously, it was required that he publish this list by November 1st each year, and the fee for the list was fixed at $30.00. The new section permits the date of publication and the amount of the fee to be determined by the Secretary of State. The November 1st publication date was reasonable so long as all annual reports and franchise tax payments were due on the same date of each year. However, the 1933 Act was amended in 1981 to require the staggered filing of annual reports. As a consequence, the November 1st date has become arbitrary. The change will permit the Secretary of State to furnish this list at an earlier date. The Secretary of State has indicated that the $30.00 fee presently charged does not cover the printing and postage costs.

SECTION 1.30. ABSTRACT OF CORPORATE RECORD.

This section makes no substantive change in §155.1 of the 1933 Act.

SECTION 1.35. INTERROGATORIES TO BE PROPOUNDED BY THE SECRETARY OF STATE.

This section makes no substantive change in §153 of the 1933 Act.

SECTION 1.40. INFORMATION DISCLOSED BY INTERROGATORIES.

This section makes no substantive change in §154 of the 1933 Act.

SECTION 1.45. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE REVIEW LAW.

This section makes no substantive change in §148 of the 1933 Act.

SECTION 1.50. ADMINISTRATIVE PROCEDURE ACT.

This section makes no substantive change in §152a of the 1933 Act.

SECTION 1.55. CERTAIN POWERS RESERVED TO THE GENERAL ASSEMBLY.

This section makes no substantive change in §162 of the 1933 Act.

SECTION 1.60. EFFECT OF REPEAL OF PRIOR LAW ON RIGHTS ACCRUED OR LIABILITIES OR PENALTIES INCURRED.

This section makes no substantive change in §163 of the 1933 Act.

SECTION 1.65. EFFECT OF INVALIDITY OF PART OF THIS ACT.

This section makes no substantive change in §164 of the 1933 Act.

SECTION 1.70. MISCELLANEOUS APPLICATIONS.

This Section updates cross-references to the new system of the 1983 Act and eliminates separate section designations. For ease of organization of the 1983 Act, all sections which apply the provisions of the 1983 Act to existing corporations or special types of corporations are to be grouped together under a single heading. The reorganization of the 1933 Act and its renumbering require that cross-references also be updated.

SECTION 1.80. DEFINITIONS.

This section combines all definitional sections under a single heading. It adds new definitions and eliminates others. The organization of the 1983 Act is best facilitated by eliminating separate section designations and including all definitions as paragraphs under a single heading. The changes in substance are set forth in the lettered subparagraphs following:

(c) "Articles of incorporation" and "restated articles of incorporation" are defined. The definition of articles of incorporation has been clarified to include not only the original articles but also any and all amendments regardless of how such amendments may be evidenced, including amendments contained within merger plans and statements of cancellation. Restated articles are a new document that restates all articles as amended. It will supersede previous articles and amendments.

(e) "Incorporator" is redefined. In 1981 §46 of the 1933 Act was amended to eliminate the requirement that an incorporator be a subscriber, but the legislature overlooked the fact that §2.5 of the 1933 Act defined an incorporator as a subscriber. The 1983 Act redefines an incorporator to conform with §46 of the 1933 Act as amended which eliminated the requirement that an incorporator be a subscriber.

(h) Both "certificated shares" and "uncertificated shares" are defined. The 1983 Act authorizes a corporation to issue uncertificated shares. The 1933 Act defines certificate of stock. See comment under §6.35.

(i) "Authorized shares" is defined, eliminating the phrase "with or without par value". This latter phrase has been deleted from the definition because the concept of "par value" is to be eliminated from the 1983 Act. See also §1:80(j).

(j) "Paid-in capital", a new term, is defined. "Paid-in capital" is intended to be a substitute for the concepts of "stated capital" and "paid-in surplus" of the 1933 Act, reflecting a revision of the financial provisions and conforming to the proposed 1983 Revised Model Business Corporation Act. The drafters recognize that the principles once supporting the use of the terms "par value", "stated capital", and "paid-in surplus" are no longer valid. Traditionally, those terms offered a form of protection and security to creditors and preferred shareholders. Today, provisions based on these terms are meaningless, if not misleading, because many corporations have authorized shares with a nominal par value or without par value. In addition, the elimination of "stated capital" and "paid-in surplus" is consistent with the provisions of §9.10, the section governing all distributions under the 1983 Act, including dividends and redemptions. A distribution will be prohibited only if it would (a) render the corporation insolvent or (b) reduce the net assets to less than zero or less than the maximum amount payable to preferred shareholders in liquidation if the corporation were then liquidated. The limitation in §9.10 is expressed without the use of the terms "stated capital" or "paid-in surplus"; thus, no definition of these concepts is needed.

(k) "Net assets" is redefined to exclude the concept of treasury shares. The definition of "net assets" under the 1933 Act has been clarified by deleting confusing language and adopting the test of legal insolvency. Since the concept of "treasury shares" (§2.10 of the 1933 Act) has been eliminated, a corresponding change has been made in this section.

(1) "Registered office" is redefined, adding language to clarify the purpose of the registered agent. It is intended to make clear that the registered agent may be served with process, notice or demand at the corporation's registered office.

(q) "Common shares" is defined. The 1933 Act did not define "common shares". The term is used in several sections and now allows the Secretary of State to accept articles of incorporation or articles of amendment which provide for more than one class of "common" shares or more than one series of "common" shares. See comment under §6.05.

SECTION 2.05. INCORPORATORS.

Section 2.05 of the 1983 Act sets forth the qualifications for incorporators. The qualifications are unchanged from those contained in §46 of the 1933 Act, except that §2.05 lowers the minimum age of an incorporator from 21 to 18. Eighteen is now the age of majority under Illinois law for most other purposes. The requirement that an incorporator be a subscriber has been deleted. The execution, verification, filing and recording requirements for all corporate documents, formerly contained in §46 of the 1933 Act, are now contained in §1.10 of the 1983 Act.

SECTION 2.10. ARTICLES OF INCORPORATION.

Section 2.10 contains provisions relating to the contents of the articles of incorporation.

Although the information which may be contained in the articles of incorporation under §2.10 is not substantially different from the information required to be contained in the articles of incorporation under §§47 and 47.1 through 47.5 of the 1933 Act, §2.10 of the 1983 Act will provide additional flexibility and result in simplified articles of incorporation for many corporations. Under §2.10, certain provisions are required to be contained in the articles of incorporation, other provisions may, at the option of the incorporators, be contained in the articles and still other provisions are assumed to be contained in the articles unless the articles specifically provide otherwise. The required provisions will be less inclusive and detailed and will reflect other provisions contained in the 1983 Act. Many corporations which do not require special provisions for management of the corporation or special voting rights will not need to utilize the permissive provisions of §2.10, and only the required provisions together with the assumed provisions should suffice. The assumed provisions provide that, unless otherwise stated, the corporate duration will be perpetual and the franchise tax will be based upon the entire paid-in capital. The assumed provisions are based upon experience under the 1933 Act, which indicated that nearly all corporations elect to have a perpetual duration and expect all their property and business will be in Illinois.

The optional provisions will be available for those corporations which need or desire other more complex provisions. However, even those corporations which elect not to utilize other permissive provisions will likely elect to use an optional provision which allows the incorporators to name the initial board of directors in the articles of incorporation. Under the 1933 Act, the board of directors could only be elected after the issuance of the certificate of incorporation and at the organizational meeting of the shareholders.

The execution, verification, filing and recording requirements for all corporate documents are now consolidated in §1.10 of the 1983 Act.

SECTION 2.15. EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION.

Section 2.15 is unchanged from §49 of the 1933 Act and provides that the existence of the corporation commences upon the issuance of the certificate of incorporation by the Secretary of State. The 1983 Act has eliminated the requirement, contained in §50 of the 1933 Act, that at least $1,000 be paid in as consideration for the issuance of shares before the corporation could begin transacting business. The original purpose of the minimum capitalization requirement was to protect creditors of a newly formed corporation by providing a minimum amount of assets which would be available to back-up the initial corporate obligations. The elimination of this requirement in the 1983 Act recognizes that $1,000 was inadequate and that, in any event, creditors rely on other statutory, common law and contractual rights to protect themselves in transactions with new corporations. Only a small minority of states require a minimum capitalization in order to commence business.

This provision, by establishing a time at which the corporation is conclusively deemed to have been brought into existence, dispenses with a portion of problems raised by the confusing doctrines of de facto corporations and corporations by estoppel.

SECTION 2.20. ORGANIZATION OF CORPORATION.

Section 51 of the 1933 Act provided for the traditional method of completing the formation of the corporation. Under §16 of the 1933 Act, each of the subscribers to shares of the corporation was deemed to become a shareholder upon the issuance of the certificate of incorporation. Following issuance of the certificate of incorporation, an organizational meeting was held by the shareholders to complete the internal organization of the corporation, the principal item of business being the election of directors, although the shareholders often adopted by-laws if the articles so provided. The newly elected directors then met to elect officers, adopt by-laws, if the articles did not reserve that right to the shareholders, and otherwise complete the organization of the corporation.

Section 2.20 of the 1983 Act allows for greater flexibility, less formality and added simplicity in the organization of new corporations. Under §2.20, if the initial directors are named in the articles as permitted by §2.10, after the issuance of the certificate of incorporation, the directors named in the articles are in a position to elect officers, adopt by-laws and proceed with the business of the corporation. The only organizational meeting need is that of directors. In addition, the first meeting of directors may be called by a majority of the directors named in the articles, thus further simplifying the remaining organizational procedure. This simplified procedure for completing the organization of the corporation was unavailable under the 1933 Act.

If the incorporators do not want to name the directors in a publicly filed document, or if for any other reason the incorporators do not want to use the simplified organizational procedure, a clear pattern of organization and authority of incorporators is provided by §2.20. If the initial directors are not named in the articles and no shares have been issued, the incorporators will elect the directors at an organizational meeting. Alternatively, if shares have been issued pursuant to a pre-organization subscription agreement, the shareholders will elect the directors at an organizational meeting if the initial directors were not named in the articles. Following the organizational meeting of the incorporators or shareholders, as the case may be, the directors then meet to elect officers, adopt by-laws and otherwise complete the organization of the corporation.

SECTION 2.25. BY-LAWS.

Under §25 of the 1933 Act, the power to adopt, amend or repeal the by-laws was vested in the board of directors, unless reserved to the shareholders by the articles of incorporation. Section 2.25 of the 1983 Act puts the board and the shareholders on an equal footing with respect to the by-laws. Under §2.25 both the board of directors and the shareholders are authorized to adopt, amend or repeal the by-laws unless the articles reserve such power only to the shareholders. Even if the articles do not reserve to shareholders the power to adopt, amend or repeal by-laws and such power may be exercised by both directors and shareholders, §2.25 provides that no by-law adopted by the shareholders may be altered, amended or repealed by the directors if the by-laws so provide. The shareholders' option of "freezing" by-law provisions can substantially increase the power and rights of shareholders and assure greater protection of shareholder interests if additional protection is deemed appropriate.

SECTION 2.30. EMERGENCY BY-LAWS.

Section 2.30 is unchanged from §25a of the 1933 Act and provides for the adoption of emergency by-laws by the board of directors which may be operative in certain national emergencies.

SECTION 3.05. PURPOSES OF CORPORATIONS.

This section is basically unchanged from §3 of the 1933 Act. Under the 1981 amendments to the 1933 Act, it is no longer required that corporations detail their specific purposes. A general statement of purposes is adequate as in Delaware and other modern corporation jurisdictions.

SECTION 3.10. GENERAL POWERS.

This section follows the scheme of §5 of the 1933 Act. The significant changes are as follows:

(d) Removes the restriction contained in §5 (d) of the 1933 Act on the power of the corporation to take or hold real or personal property which enables the corporation to accomplish any or all of its purposes. Historically, Illinois has required corporations to state specific purposes in their articles of incorporation. If a purpose was to deal in real property, the corporation had unlimited power to do so. If the purpose omitted dealing in real property, the corporate power was limited to dealing in real property only to the extent necessary to accomplish the corporation's purposes. In 1981, the 1933 Act was amended to permit a general all inclusive statement of purposes, obviating the need to specify dealing in real property. In light of this change the Advisory Committee believed that the present restriction on taking and holding real property is not necessary or desirable, and the last clause of paragraph (d) of §5 and §17 of the 1933 Act was eliminated.

(f) Section 5 (f) of the 1933 Act authorized a corporation to acquire and own real property and make loans to employees for the purpose of providing homes for the employees. These limitations have been removed. See comment under §3.10 (d) for discussion on the limits on ownership of real property. A 1981 amendment to the 1933 Act removed limitations on loans to officers and directors from §42-4. The present Act permits a corporation to make loans to employees generally and also to make loans to agents. No abuse of this power is foreseen, but the liabilities imposed by law and those imposed by the 1983 Act will be applicable in any event. See §§7.80, 8.60 and 8.65.

(g) Section 5 (g) of the 1933 Act contained limitations on the ownership and control of banks and bank holding companies as stated in the language of the Illinois Bank Holding Company Act. This subsection (g) of §3.10 removes specific limitations but adds a cross-reference to the Illinois Bank Holding Company Act. Extensive and complicated amendments have recently been made in the Illinois Bank Holding Company Act of 1957. Rather than to detail these changes in the 1983 Act, it was believed that a cross-reference is the better approach. A requisite notice of banking limitations will still be provided while allowing the provisions of the 1983 Act to be flexible enough to accommodate future changes in the Banking Act without further changes having to be made in the Business Corporation Act.

(m) Section 5(m) of the 1933 Act. requires that loans to state and federal governments be made only in time of war for war purposes. The present provision removes the limitations on loans to governments. The limitation on loans to state and federal governments was•historical in origin. The limitation is no longer valid and neither benefits corporations nor governments, especially in light of present corporate practices and economic conditions.

(p) Section 8.75 provides that a corporation may indemnify its officers, directors, etc. However, under §5 (p) of the 1933 Act, indemnification provisions, if any, were to be set forth in the by-laws. This provision under §3.10 (p) removes the restrictions as to where the indemnification provisions may be set forth. To require that the only document in which valid indemnification provisions may be stated is the by-laws is an irrational restriction. Such provisions can quite reasonably be set forth in the articles of incorporation, contracts, statements of policies, and standing or specific resolutions of the board of directors without any harm to the corporation, its creditors, or others.

(q) This subsection which is new, permits the corporation to be a promoter, partner, member, associate or manager of any partnership, joint venture, or other enterprise. It has been added to the 1983 Act to remove any uncertainty that an Illinois corporation has that power. In the proposed 1983 Revised Model Business Corporation Act provision, trusts are included within the category of other enterprises but have not been included in the 1983 Act provision due to the requirements of the Illinois act on Trust Companies and §165 of the 1933 Act. It remains to be seen as to whether the courts will interpret the provision to permit a corporation to be a joint venturer with a trust company so long as the corporation does not itself execute trusts.

SECTION 3.15. DEFENSE OF ULTRA VIRES.

This section is unchanged from §8 of the 1933 Act.

SECTION 3.20. UNAUTHORIZED ASSUMPTION OF CORPORATE POWERS.

This section is unchanged from §150 of the 1933 Act.

SECTION 4.05. CORPORATE NAME OF DOMESTIC OR FOREIGN CORPORATION.

Section 4.05 combines §§9 and 104 of the 1933 Act concerning recordation by the Secretary of State of the corporate names of domestic corporations and of foreign corporations authorized to transact business in Illinois. It changes the "deceptively similar" standard to one that is "distinguishable upon the records in the office of the Secretary of State". The new standard is intended to relieve the Secretary of State from having to make any determinations based on deceptiveness, confusing similarity or other such considerations derived from unfair competition and trademark laws. Section 4.05 merely blocks recordation by the Secretary of State of a corporate name which is the same or otherwise indistinguishable from an earlier recorded name, until, in case of a dispute, a court determines priority on the basis of use in the marketplace under state and federal laws, including the common law of unfair competition, rather than on the basis of corporate name recordation under the 1933 Act or the 1983 Act.

SECTION 4.10. RESERVED NAME.

Section 10 adopts the language of §10 of the 1933 Act which provided for the reservation of a corporate name with the Secretary of State but extends the period of reservation from 60 to 90 days. It also allows for a domestic corporation or foreign corporation authorized to transact business in Illinois to reserve an assumed corporate name and for the Secretary of State to revoke a reservation if made contrary to the 1933 Act.

SECTION 4.15. ASSUMED CORPORATE NAME.

Sections 9a and 104a of the 1933 Act are combined in §4.15. Multiple assumed corporate names are permitted and the requirement of a corporate suffix for an assumed corporate name is eliminated. The standard of “distinguishable” adopted in §4.05 for the recordation of corporate names with the Secretary of State will now be applied to the recordation of assumed corporate names with the Secretary of State. The right to record multiple assumed corporate names has been established and the renewal period extended.

Renewal of assumed corporate names will be required every five years following an initial registration period of up to five years. The renewals will be in calendar years evenly divisible by five (e.g., 1985, 1990, etc.). Renewals shall be made within a sixty day period preceding the expiration of the term of the assumed corporate name.

Recording of the assumed corporate name in the office of the Recorder of Deeds where the registered office of the corporation is located is now permissible.

SECTION 4.20. CHANGE AND CANCELLATION OF ASSUMED CORPORATE NAME.

This section enlarges the 1979 amendment to the 1933 Act which provided for assumed corporate names for domestic and foreign corporations. Former §§9a and 104a failed to provide for the voluntary changing or cancellation of an assumed corporate name. Section 4.20 permits changing or cancellation of an assumed corporate name following action by the board of directors. The Secretary of State may also unilaterally cancel an assumed corporate name if the corporation fails to renew its application, or if.. it is a domestic corporation which is dissolved or a foreign corporation whose certificate of authority to do business has been revoked.

SECTION 4.25. REGISTERED NAME OF FOREIGN CORPORATION.

This section permits a foreign corporation not transacting business or authorized to transact business in Illinois to register its corporate name or names with the Secretary of State if the corporate name is available in Illinois. Renewal and cancellation provisions are also provided.

This section is similar to §§10 and 11 of the existing Model Business Corporation Act. Its purpose is to provide a method by which a foreign corporation may register its name to assure its availability in the event the corporation elects either to do business in Illinois or to obtain a certificate of authority.

SECTION 5.05. REGISTERED OFFICE AND REGISTERED AGENT.

Section 5.05 of the 1983 Act combines the subject matter of §§11 and 109 of the.1933 Act into a single section and adopts a provision that a registered agent remains an agent for service throughout the statute of limitations period following dissolution or revocation unless the agent resigns or the corporation appoints a successor. Combining the domestic and foreign sections of the 1933 Act promotes a uniform treatment of domestic and foreign corporations. The new provision regarding status of a registered agent following dissolution or revocation has been added to resolve a recurring question existing under the 1933 Act.

SECTION 5.10. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT.

Section 5.10 combines the subject matter of §§12 and 110 of the 1933 Act into a single section and adopts the execution and filing requirements of §1.10. It sets forth the requirements for authorizing and reporting a change of registered agent or office or both. Combining the domestic and foreign sections of the 1933 Act promotes uniform treatment of domestic and foreign corporations.

SECTION 5.15. RESIGNATION OF REGISTERED AGENT.

Section 5.15 combines and replaces §§11a (relating to domestic corporations) and 109a (relating to foreign corporations) of the 1933 Act which contained provisions for "VACATION OF OFFICE BY REGISTERED AGENT". It requires notice to the corporation by regular mail prior to filing with the Secretary of State. Formerly, the notice was to be given to the corporation by registered or certified mail after informing the Secretary of State of a resignation. It requires that the statement to the Secretary of State recite that notice has been sent to the corporation and the address where sent, and provides that the effective date may be not less than 30 days after filing with the Secretary of State. Formerly, the effective date of. resignation was required to be not less than 60 nor more than 90 days after the date of filing with the Secretary of State. The change in the section title more accurately will reflect the section's subject matter. Combining the domestic and foreign sections of the 1933 Act promotes uniform treatment.

SECTION 5.20. CHANGE OF ADDRESS OF REGISTERED AGENT.

Section 5.20 combines 5§12(a) and 110 (a) of the 1933 Act, thereby combining the domestic and foreign sections into a single section. It provides a means for a registered agent to report a change of his office to the Secretary of State without need for formal corporate action.

SECTION 5.25. SERVICE OF PROCESS ON DOMESTIC OR FOREIGN CORPORATIONS.

Section 5.25 combines §§13 and 111 of the 1933 Act, thereby combining the domestic corporations and foreign corporations provisions of the 1933 Act into a single section. It provides- that the registered agent is the primary agent for service of process, notice, or demand, and that the Secretary of State is the secondary agent in the absence of a registered agent. It also clarifies the secondary agent status of the Secretary of State, even after a dissolution or revocation, and expands details of the procedure for service on the Secretary of State. Combining the foreign and domestic sections of the 1933 Act promotes uniform treatment for both types of corporations. It also specifically authorizes service of process on the Secretary of State after a domestic corporation has been dissolved, but only if the registered agent cannot be served.

SECTION 5.30. SERVICE OF PROCESS ON FOREIGN CORPORATION NOT AUTHORIZED TO TRANSACT BUSINESS IN ILLINOIS.

Section 5.30, which had no counterpart in the 1933 Act, provides for service of process on the Secretary of State in the case of an action against the foreign corporation, if the foreign corporation transacts business in Illinois without having obtained a certificate of authority to transact business, and requires the person instituting action to furnish the foreign corporation's address to the Secretary of State. It fills a gap in the present statutory scheme. The Advisory Committee believed that failure to comply with the provisions of the Business Corporation Act on qualification to do business should not benefit a foreign corporation by making service upon it in Illinois difficult or impossible.

SECTION 6.05. AUTHORIZED SHARES.

Each corporation has the power to create and issue the number of shares set forth in its articles of incorporation. Such shares may be divided into classes, including classes of common shares, with such rights, preferences and restrictions as are set forth in the articles. Subject to §7.40, the articles of incorporation may limit or deny voting rights or provide special voting rights for any given class (or series within a class) or of all classes of shares. Section 14 of the 1933 Act did not expressly permit more than one class of common, shares and required one class of shares (or series thereof) always to have voting rights on all matters. The revisions in this section recognize the desirability, in certain contexts, of permitting voting on only certain matters, such as allowing one class of shares to elect some members of the board of directors and a different class of shares to elect the rest, or even not to elect any. The deletion of references to par value is consistent with the fact that par value is permissive under the 1983 Act.

SECTION 6.10. ISSUANCE OF SHARES OF PREFERRED OR SPECIAL CLASSES IN SERIES.

This section is essentially the same as §15 of the 1933 Act. If provided in the articles of incorporation, shares of any preferred or special class may be divided into and issued in series. The articles of incorporation may allocate differing rights and preferences among the different series within a given class, but only with respect to dividend rates, redemption rights, payment for shares in the event of liquidation, sinking fund provisions, conversion rights, the limitation or denial of voting rights and the grant of special voting rights. The limitation or denial of voting rights and the grant of special voting rights was added by this section to the list of permissible rights and preferences which may vary between series and is a logical adjunct of the extension of these concepts in the 1983 Act. The articles of incorporation may expressly vest authority in the board of directors to establish series within a class and to fix the variations in relative rights and preferences. A statement describing the board resolution authorizing the issuance of shares in series must still be executed and filed with the Secretary of State, pursuant to the more liberal general execution and filing requirements of §1.10 of the 1983 Act.

SECTION 6.15. ISSUANCE OF FRACTIONAL SHARES OF SCRIP.

This section is identical to §22 of the 1933 Act. A corporation may issue a certificate for a fractional share or, in lieu thereof, may pay cash or issue scrip entitling the holder to a certificate for a full share upon surrender of scrip aggregating a full share. A fractional share certificate shall, but scrip shall not unless otherwise provided therein, entitle the holder to fractional voting rights, to receive dividends and to participate in liquidation distributions. Scrip may provide that it will become void if not exchanged for certificates for full shares within a specified period, that shares for which it is exchangeable will be sold by an agent on behalf of the holder, and may be subject to any other conditions which the board of directors deems advisable.

SECTION 6.20. SUBSCRIPTION FOR SHARES.

This section is identical to §16 of the 1933 Act. Subscriptions for shares are irrevocable for six months unless otherwise provided in-the subscription agreement or unless all subscribers consent. Filing of articles of incorporation constitutes acceptance by the corporation of all subscriptions and thereupon subscribers are deemed to be shareholders and the corporation has the right to enforce the subscriptions in its own name. Unless otherwise provided in the subscription agreement, subscriptions are to be paid at the time and in the manner fixed by the board of directors. Any call for payment must be uniform as to shares of the same class or series. The corporation may collect amounts due in the same manner as other debts or the by-laws may prescribe other penalties for failure to pay, so long as no forfeiture of shares or amounts paid may be declared against an estate before distribution of the estate or against any subscriber until 20 days after demand.

SECTION 6.25. CONSIDERATION FOR SHARES.

This section expands the discretion of the board of directors in fixing the nature and amount of consideration for which shares can be issued. The board of directors determines the amount and nature of consideration necessary for the issuance of shares so long as a definite price, a minimum price, or a formula or method for determining price is established. This section also eliminates the fiction contained in §17 of the 1933 Act of establishing consideration for stock issued or distributed pursuant to stock splits, dividends, exchanges or conversions. Upon authorization by the board of directors, a corporation may issue or distribute shares in exchanges or conversions, or effectuate stock splits or dividends, without consideration, provided that issuance of shares of one or more classes or series to holders of shares of other classes or series must be permitted by the articles of incorporation or authorized by a majority of the outstanding shares of the class or series to be distributed. References to par and stated value and to stated capital and surplus, as elsewhere in the 1983 Act, have been eliminated. It is not intended that par value shares may be originally issued for less than par. Thus, shares with par value should be originally issued for an amount at least as great as par, notwithstanding the lack of express statutory provision to this effect.

SECTION 6.30 PAYMENT FOR SHARES.

This section is identical to §18 of the 1933 Act, except that judgments of the board of directors as to value are made expressly subject to the director conflict of interests provisions of §8.60 and the prohibition against promissory notes and future services as payment for shares has been eliminated. Consideration for the issuance of shares may consist of money, other property (tangible or intangible) or labor or services actually performed for the corporation. In the absence of actual fraud, the judgment of the board of directors or the shareholders as to the value of consideration which they have profferred and establishes conditions under which their participation in the judgment process is permissible. The removal of promissory notes from the category of prohibited forms of payment in essence authorizes their use, but the directors have the responsibility to determine the value of a promissory note submitted as payment for shares. The similar removal of future services clarifies the existing requirement that consideration may only include services actually performed; it does not permit issuance of shares for future services. Section 19 of the 1933 Act (determination of amount of stated capital) has not been included in the 1983 Act. The 1983 Act employs the concept of paid-in capital to replace stated capital and paid-in surplus.

SECTION 6.35. SHARES REPRESENTED BY CERTIFICATES AND UNCERTIFICATED SHARES.

Corporate shares shall be represented by certificates or shall be uncertificated shares (a concept introduced by this section). Certificates must be duly signed by appropriate corporate officers and may be sealed. The category of officers who may sign certificates has been expanded from §21 of the 1933 Act. Facsimile signatures may be utilized if certificates are countersigned by a transfer agent. Certificates must set forth certain information (or indicate that it will be furnished by the corporation free of charge), including preferences, limitations, restrictions and special rights pertaining to the particular class or series of shares and the variations in the relative rights and preferences, to the extent fixed, between shares of each series of the same class. Certificates must also set forth that the corporation is organized under Illinois law, the name of the person to whom issued, the number and class of shares and the designation of series (if any). Certificates may not be issued until shares are fully paid.

Unless prohibited by the articles of incorporation, the board of directors may authorize some or all of any or all classes and series of shares to be uncertificated shares, provided that uncertificated shares may not replace certificates until such certificates are surrendered to the corporation for reissuance as uncertificated shares. Within a reasonable time after issuance or transfer of uncertificated shares, written notice must be given to the registered owners thereof containing the required information which would otherwise have been set forth on certificates. Except as otherwise expressly provided by law, the rights and obligations of the holders of certificated and uncertificated shares (representing shares of the same class and series) shall be identical. The introduction of the concept of uncertificated shares recognizes that the existing system of transferring paper share certificates can be cumbersome and that technological advances have made possible centralized registration of share ownership and the capability of almost instant transfer of shares, presumably with equivalent or greater security than the existing manual transfer system. To date, Illinois has not adopted the proposed revision to Article 8 of the Uniform Commercial Code which would govern the purchase, sale, pledging and transfer of uncertificated shares. Similarly, many other states have not yet adopted such revisions to Article 8, which could lead to difficulties if uncertificated shares of Illinois corporations were to be. bought, sold, pledged or transferred in those states. This section also deletes references to par value, which is consistent with the rest of the 1983 Act.

SECTION 6.40. LIABILITY OF SUBSCRIBERS, SHAREHOLDERS, PERSONAL REPRESENTATIVES, AND PLEDGEES.

This section is substantially the same as §23 of the 1933 Act. Holders of and subscribers to shares have no obligations to corporations and creditors of corporations beyond the obligation to pay the full consideration for the shares, and even this obligation does not apply to good faith transferees having no knowledge that some or all of the consideration has not been paid. Fiduciary holders (e.g., executors, trustees, receivers), pledgees and other holders of shares as collateral security have no personal liability as shareholders; the beneficial owners of the shares (and the estate and funds under fiduciary control) are liable only for any unpaid consideration for the shares. The only change made by this section was the addition of a phrase making it clear that liability under this section is limited to the unpaid portion of the consideration for which shares are issued. See comment under §6.35 indicating that share certificates may not be issued until shares are fully paid.

SECTION 6.45. EXPENSES OF ORGANIZATION, REORGANIZATION AND FINANCING.

This section is identical to §20 of the 1933 Act. Reasonable expenses of organization and reorganization of a corporation and reasonable compensation for the sale or underwriting of shares may be paid or allowed by a corporation out of the consideration received in payment for shares without rendering such shares not fully paid and non-assessable.

SECTION 6.50. SHAREHOLDERS' PREEMPTIVE RIGHTS.

For corporations organized after January 1, 1982, there are no preemptive rights to acquire shares (including treasury shares) except to the extent provided in the corporation's articles of incorporation. Corporations organized prior to January 1, 1982, may, limit or deny preemptive rights to the extent provided in their articles of incorporation. Moreover, if shareholder approval is obtained and the articles do not provide otherwise, a corporation may offer shares to employees without first offering them to the shareholders. Consideration for par value shares offered to shareholders may exceed par value. Except for the deletion of references to treasury shares and par value, this section is unchanged from §24 of the 1933 Act. The deletions are consistent with the 1983 Act's elimination of the concepts of treasury shares and par value.

GENERAL COMMENTS TO ARTICLE 7

The principal statutory provisions affecting shareholders' rights, voting rights in person and by proxy, meeting procedures, voting mechanics, shareholder voting agreements, shareholder examination of records, and shareholder actions, are brought together in 15 sections of Article 7 of the 1983 Act. Most of this subject matter was covered in 13 scattered sections of the 1933 Act. (§§ 26-32, 45, 45a, 145, and 147).

SECTION 7.05. MEETINGS OF SHAREHOLDERS.

This section broadens the inflexible requirements of §26 of the 1933 Act that the place and time of annual and special meetings beset by the by-laws, but absent any by-law provision, the place shall be at the registered office of the corporation. This section permits by-laws conferring discretion on the directors to fix the time and place of meetings. Provisions that special meetings may be called by the president, the board of directors, or the holders of 20% or more of the voting shares remain largely unchanged. However, §7.05 now provides a new remedy for failure to hold prescribed meetings. It provides that an annual meeting not held within six months after the end of the fiscal year, or 15 months after the previous annual meeting may be held on court order applied for by any voting shareholder. Since non-voting shares are now authorized, rights to call or attempt to call meetings are expressly confined to voting shares.

SECTION 7.10. INFORMAL ACTION BY SHAREHOLDERS.

The trend toward increasing informality and the efficiency of resorting to it is recognized in this section by providing that any action that may be taken at a meeting may be taken without a meeting if the holders of the number of shares required for action (instead of the unanimous consent required in §147 of the 1933 Act) consent in writing. Non-consenting shareholders are entitled to prompt notice of corporate action properly effected under this section, and a further provision, added by legislative amendment, requires five-day notice in writing of proposed non-meeting action must be given to all voting shareholders. It is unclear whether this latter provision requires that a period of five days after notice must elapse before the action consented to informally may taken effect, or whether it requires a period of five days after notice before the time when informal consent may actually be taken without a meeting.

SECTION 7.15. NOTICE OF SHAREHOLDERS' MEETINGS.

This section governs all meeting notice requirements, bringing together in one section, subject to waiver of notice under §7.20, provisions formerly scattered in separate sections of the 1933 Act for meetings authorizing different actions.

The 1933 Act, primarily in §27, provided that notice of annual or special meetings could not be given <u>less</u> than 10 days (20 days for organic changes such as mergers and consolidations) nor <u>more</u> than 40 days before the meeting. Section 7.15 now extends the previous maximum notice period from 40 days to 60 days for all types of proposed action to allow more for all types of proposed action to allow more time for proxy solicitations. The minimum period of 10 days (20 for organic changes) remains unchanged.

The effective date of giving notice is defined as the time of mailing the notice.

SECTION 7.20. WAIVER OF NOTICE.

This section retains the 1933 Act provision, in §145, that notice of a meeting may be waived before or after the meeting, but it adds an express provision that attendance at a meeting constitutes a waiver unless made for the purpose of objecting to the holding of the meeting because of improper notice. This section thus recognizes the fairness of permitting a. person who claims legally insufficient or improper notice to attend a meeting in order to question its legality on that basis, but otherwise it gives some flexibility to corporations which conduct their meetings or affairs on a relatively informal basis.

SECTION 7.25. FIXING RECORD DATES.

This section prescribes how to determine the times of shareholder entitlement to vote, to notice, and to dividend payments. Section 7.25 recognizes that the single, exclusive procedure of fixing a record date, either by the board in advance, or by a formula provided for in the by-laws, or failing those, by automatic mandate of the statute, is an entirely satisfactory procedure and preferable to the mechanism of "closing the books". The latter procedure was a common statutory alternative in many states and expressly permitted under the 1933 Act but is now rarely used. A reference has also been made to a "share exchange, dissolution or sale, lease or exchange of assets" after the reference to a merger or consolidation, to make the provision consistent with §§11.05-11.70.

SECTION 7.30. VOTING LISTS.

This section retains the previous requirement, in §32 of the 1933 Act, that the proper officer of the corporation at least 10 days before the meeting make a list, which shareholders have the right to inspect, of all shareholders entitled to vote at the next shareholders' meeting. However, §7.30 clarifies previous uncertainty and dispute about a shareholder's right to copy such lists by now expressly authorizing such copying at the shareholder's own expense. Language is also used to refer to the making of the lists as of the record date, to conform to the new exclusivity of that method of determining time of voting entitlement in §7.25.

SECTION 7.35. INSPECTORS.

This sections is identical to §26a of the 1933 Act.

SECTION 7.40. VOTING OF SHARES.

This section clarifies entitlement to basic voting rights previously provided for in §28 of the 1933 Act. An amendment to that section in 1981 had already eliminated mandatory cumulative voting for the election of directors and relaxed the old and inflexible statutory prohibition against non-voting shares in Illinois corporations. The 1981 amendment retained, in §28(a), the historic right to vote, and to vote cumulatively, in the absence of any provision in the articles of incorporation. Sections 28 (b) and (c) provided for the first time in Illinois that the articles of incorporation of corporations organized on or after January 1, 1982, the effective date of the 1981 amendment, could initially provide, or could be amended by the then two-thirds vote to provide, for the limiting or eliminating of cumulative voting-or all voting rights, so long as one class or series of shares' retained voting rights. That 1981 amendment, however, created a difference between the amendatory vote required to change voting rights in a post-1981 corporation and a pre-1982 corporation: only by unanimous vote could a pre-1982 corporation amend its articles to limit or deny cumulative or voting rights.

The 1983 Act does not change the 1981 amendment in conferring voting and cumulative voting rights on all shareholders in the absence of any provision otherwise in the articles of incorporation (§7.40(a)), and it retains authorization for any post-1981 corporation to limit or eliminate such rights in its initial articles of incorporation (§7.40(b)). In further authorizing any amendment of articles to limit or eliminate such rights (§7.40(c)), the 1983 Act eliminates the difference in amendatory vote requirements between post-1981 and pre-1982 corporations. Any amendment of the articles of any corporation, whether pre-1982 or post-1981, now requires only a two-thirds vote in the absence of any provision in the articles of incorporation otherwise, or a lesser vote, not less than a majority, provided for in the articles as authorized under §11.20. In a pre-1982 corporation, however, such an amendment would trigger dissenters' appraisal rights under §11.65 (a) (3) (iii). Such rights would also arise if a pre-1982 Illinois corporation were to be merged into a post-1981 Illinois corporation for the purpose of eliminating cumulative voting.

The uniform amendatory voting requirements to change voting rights in all corporations without regard to date of incorporation also reflects legislative rejection of any contention that language of the Illinois Constitution of 1970, effective July 1, 1971, which withdrew constitutional protection for cumulative voting rights in corporations incorporated thereafter, was intended to retain statutorily unalterable voting rights of every shareholder of a corporation incorporated before July 1, 1971. Until that date the shareholder right to vote and to vote cumulatively was protected both by statute and by a constitutional provision, Article XI, Section 3, of the Illinois Constitution of 1870, which required the Illinois legislature to provide by law that every shareholder have the right to vote the number of shares owned by the shareholder, and to vote cumulatively.

The 1970 Constitution undertook to withdraw constitutional protection for such rights as to corporations incorporated after its July 1, 1971 effective date, but it did so by negative implication, in Article XIV, section 8, in simply providing that "shareholders of all corporations heretofore organized under any law of this state which requires cumulative voting of shares for corporate directors shall retain their right to vote cumulatively for such directors." (emphasis supplied). Since full voting and cumulative voting rights continued to be protected by statute between 1971 and 1981, the question whether such rights could be limited or eliminated by statute in corporations incorporated before the 1970 Constitution remained academic. When statutory protection was partly removed under the 1981 statutory amendment, the treatment to be accorded to the rights of a shareholder of a pre-1971 corporation became a practical question. The 1981 amendment appeared to have assumed that any such constitutional voting right in a pre-1971 corporation could be waived, but only, as with 1971-1981 corporations, by unanimous vote on an amendment to the articles of incorporation.

The 1983 Act further assumes that the legislature has power to permit corporations whenever organized to change voting rights by a vote, less than unanimous, uniform as to all corporations, and is not restricted by any residual constitutional right of any shareholder in a pre-1971 corporation arising from the language of the 1970 Constitution, with provision for dissenters' rights in §11.65 for those shareholders whose cumulative voting rights are proposed to be removed.

The total ban on non-voting shares in Illinois before 1982 was commonly avoided by incorporating or re-incorporating in a state, such as Delaware, which allowed non-voting shares, or by merging an Illinois corporation into a surviving subsidiary incorporated in such a state. The 1983 Act removes the necessity for or attraction of employing such a mechanism, which resulted in a "flight" of many corporations from Illinois in order to achieve more flexible voting arrangements.

Section 7.40(a) retains the reference to cumulative voting in §28 (a) of the 1933 Act but in language more accurately describing that right as a shareholder's right to "cumulate such votes" rather than "cumulate said shares." Language in §28(a)(4) of the 1933 Act dealing with voting of stock belonging to a corporation or stock held by a corporation in a fiduciary capacity is now in §7.45.

The provision in §28(b) of the 1933 Act requiring "one class of shares or series" to "have voting rights in respect of all matters in every corporation," has been deleted, together with similar provisions in §14 and 528 (c) of the 1933 Act, to conform the 1983 Act to the new permissible voting arrangements. Also see comment to §8.10 as to the Roanoke case.

SECTION 7.45. VOTING OF SHARES BY CERTAIN HOLDERS.

Provisions in §30 of the 1933 Act providing rules for the voting of shares held in the name of another corporation, a deceased person, a minor ward, an incompetent person, a trustee, a receiver or a pledgee are unchanged in substance, although some stylistic changes have been made. Section 7.45 adds language, previously contained in §28 of the 1933 Act, prohibiting the voting of a corporation's own shares except for shares held by it in a fiduciary capacity.

SECTION 7.50. PROXIES.

This section expands on the statutory treatment of proxies provided for in §28 of the 1933 Act, which was limited to the express authorization of proxies and provided that a proxy is valid only for 11 months. Section 7.50 is intended to clarify difficult common law questions on the revocability of proxies. The old common law rule, stemming from the language of Justice Marshall in the leading case of Hunt v. Rousmanier's Administrators, 8 Wheat. 174, 5 L.Ed 589 (1823) , that an agency cannot be specifically enforced against a principal's revocation unless "coupled with an interest," has been clouded by uncertainty as to how that phrase should be applied to particular situations. The Restatement of Agency 2d (1958) §138 calls such an irrevocable power a "power given for security" in categorizing agency powers that in fairness should be held irrevocable for the protection of proxy holders and transferees of shares or proxy powers.

The revocation provisions of this section, taken from New York Business Corporation Law §609 and the proposed 1983 Revised Model Business Corporation Act §722, give examples of a number of forms of relationship, expressly without exhausting others, that would involve security for an obligation of a shareholder owed directly, such as an obligation to pay for shares purchased from the proxy holder (which would be a proxy coupled with an interest of the proxy holder in the shares themselves), or an obligation of the shareholder arising from a voting agreement, corporate status, or corporate transaction (which would be an "interest" in the corporation itself). In such transactions revocation by the shareholder during his life, or even by death, would not be fair to the proxy holder when the parties had expressly contracted for irrevocability, and this section would end common law doubt of the irrevocability of proxies given under such circumstances.

This section contains further provisions, such as §7.50(d), protecting the corporation in the event of the death or incapacity of the shareholder appointing the proxy; §7.50(f), protecting transferees for value of the shares subject to, an irrevocable proxy; and §7.50(g), further protecting the corporation and providing the shareholder who appointed a proxy with appropriate legal or equitable relief.

SECTION 7.55. PROXY SOLICITATION.

The 1933 Act has no provisions for proxy regulation beyond the statutory authorization for the use of proxies and their limitation in time, in §28 of the 1933 Act. However, proxy solicitations would probably have been subject at least to common law fraud provisions. Section 7.55, while not imposing any state regulation of proxy solicitation that would duplicate the proxy statement regulatory review system, now applicable under §14(a) of the Securities Exchange Act of 1934 to corporations registered under such Act, does provide an express state statutory prohibition against false or misleading solicitations in language taken from SEC Rule 14-a-9 and is probably declarative of existing case law.

SECTION 7.60. QUORUM OF SHAREHOLDERS.

This section modifies quorum requirements for voting so as to exclude any non-voting shares in quorum calculations. All shares were entitled to vote prior to the 1981 amendments to the 1933 Act so that references to "shares" in calculating quorums were assumed to refer to voting shares and required clarification in the 1983 Act. Express authorization is added for greater than-majority quorum requirements, which would include a general authorization for all acts, or all acts of a specified classification, or for any one particular specified act, and expressly covers unanimity.

SECTION 7.65. VOTING TRUST AGREEMENT.

The 1933 Act statutory provisions in §30a permitting and governing voting trusts are retained, but the right to inspect such agreements is phrased to make the right the same as the right to inspect "the record of the shareholders," which conforms the right to the §7.75 right of shareholders to examine shareholder lists for proxy solicitation and other proper purposes.

SECTION 7.70. VOTING AGREEMENTS.

No provision for voting agreements was contained in the 1933 Act, but common law has recognized the validity of voting agreements between and among shareholders in certain cases. Section 7.70 expressly validates voting agreements under which the voting "norm" provided for by statute, and even the normal corporate model of representative corporate governance itself, may be substantially altered in accordance with shareholders' wishes and commitments. The validity of such agreements, and their specific enforceability, was doubted in early cases, on the grounds that they attempted significant departures from statutory norms. A leading Delaware case held a voting "pool", whereby some of the shareholders agreed to vote their shares together, or by agreement, valid, in <u>Ringling Brothers v. Ringling</u>, 29 Del. Ch. 610, 53 A.2d 441 (Del. 1947) , but the court did not specifically enforce the agreement, so that the successful plaintiffs in seeking enforcement of the agreement were deprived of what they sought in the agreement and in the litigation. Another leading Delaware case, <u>Abercrombie v. Davies</u>, 36 Del. Ch. 371, 130 A.2d 338 (Del. 1957), invalidated a "secret" shareholders' agreement in a publicly-held corporation as an invalid attempt to avoid the strict requirements of the voting trust statute.

In Illinois the common law as expressed in <u>Galler v. Galler</u>, 32 I11. 2d 16, 203 NE 2d 577 (1964) (red. den. 1965) , was held to validate an agreement binding shareholders to vote for specified nominees for directors, and as shareholder-directors, to vote for specified by-law provisions, specified officers, and specified minimum dividends. However, qualifying language in the opinion left doubt whether a court would so favor an agreement in which less than all the shareholders were parties to the agreement or where other persons, such as innocent creditors or share transferees, would be affected. Partly in response to these reservations, and an "aside" in the <u>Galler</u> opinion suggesting that a systematic statutory implementation of departures from the corporation norm might be helpful, an Illinois Close Corporation Act was subsequently enacted. The validity and enforceability of such agreements was thus statutorily ensured in any corporation electing to become a statutory close corporation.

Section 7.70 seeks to remove any doubt of the validity and specific enforceability of shareholder agreements by providing that such agreements "for the voting of shares" may be made without apparent statutory reservations, limitations, or restrictions, and without electing statutory close corporation status.

SECTION 7.75. CORPORATE RECORDS - EXAMINATION BY SHAREHOLDERS.

Section 45 of the 1933 Act required the corporation to keep correct and complete records of the proceedings of its shareholders and directors. Shareholders who had been such for six months or who owned at least five percent of all outstanding shares were given the statutory right to examine and make extracts from the books and records, minutes and shareholder lists. Any officer or agent who refused to permit such a shareholder to see such records was liable to the shareholder in a penalty of 10% of the value of the shares owned by the shareholder.

Section 7.75 strikes a new balance between the shareholder and the corporation. Any shareholder of record must now make a written demand, but he need not be a shareholder of 5% in amount or six months duration as previously required. The burden of proving improper purpose of examination is now on the corporation, rather than the shareholder, as to voting lists (including voting trust agreements), and minutes. The shareholder has the burden of proof as to proper purpose in inspecting books or records of account. The penalty for failure to permit inspection was modified to reduce the penalty from "10%" to "up to 10%".

This section retains the shareholder's unqualified right upon written request, in subsection (e), to receive a copy of the balance sheet and income statement. The right to copy voting lists is also made express in §7.30. Section 7.75 (a) also expressly requires that the corporation keep minutes of :board committee meetings.

SECTION 7.80. PROVISIONS RELATING TO ACTIONS BY SHAREHOLDERS.

Section 45a of the 1933 Act governing shareholder derivative actions simply required the "contemporaneous ownership rule": that a shareholder must have been a shareholder at the time of the action complained of, or that the shares devolved upon the shareholder by operation of law from a person who was a shareholder at such time.

Section 7.80 of the 1983 Act adopts most of this comprehensive treatment of derivative actions newly formulated in §49 of the Revised Model Act. New provisions include a prohibition against settlement or discontinuance without court approval (§7.80(c)), and a restatement of the "contemporaneous ownership rule" (§7.80(a)). A new exception has been added to this last rule to permit an action to be brought, on application to the discretion of the court, by a shareholder who did not own the shares at the time of the transaction complained of, but who did acquire them before the wrongdoing complained of was disclosed to the public or the shareholder.

Section 7.80 (b) requires that the court complaint state with particularity that prior demand to sue made on the directors, if any, and state either why the action demanded could not be obtained or why demand was not made. In recognition of developing case law dealing with the effect of a refusal by the directors to sue when demand has been made, or a determination by a vote of disinterested directors or a committee of disinterested directors after investigation that suit would not be in the best interest of the corporation, the statute provides that a derivative action may be stayed for 30 days after commencement of the action if an "investigation of the demand" (i.e., an investigation of the matter as to which action is demanded) is in progress. The statute leaves to developing case law such questions as a shareholder's right to institute or continue a derivative action after the directors have determined on demand, or disinterested directors have determined after investigation in a derivative action commenced without demand, that the commencement or continuance of the action would not be in the best interests of the corporation.

SECTION 8.05. BOARD OF DIRECTORS.

The 1933 Act provided that the corporation "shall be managed by a board of directors." The 1983 Act provides that the corporation "shall be managed by or under the direction of the board of directors," unless the corporation has been formed under the Illinois Close Corporation Act (§§3 and 12, I11. Stat. Ch. 32, §§1203 and 1212 (Smith-Hurd 1981)), which permits a close corporation to dispense with a board of directors if the articles of incorporation so provide. The 1983 Act's provision is similar to

§35 of the existing Model Business Corporation Act and to §141 (a) of the Delaware General Corporation Law, both of which contemplate governance of the corporation by other than a board of directors if so provided in the charter.

The 1983 Act continues to allow persons who are not Illinois residents and not shareholders to be directors, unless the articles of incorporation otherwise provide, as do the existing Model Act and the Delaware Act. Also unchanged is the provision that, unless provided otherwise in the articles or by-laws, the majority of directors in office has authority to establish reasonable compensation of directors for services as directors, officers or otherwise. Under the 1983 Act, the directors continue to have this authority "irrespective of any personal interest" and, therefore, not subject to the provisions of the new §8.60 dealing with director conflict of interest.

SECTION 8.10. NUMBER, ELECTION AND RESIGNATION OF DIRECTORS.

Number. Under the 1983 Act, the board of directors is to consist of one or more members to be fixed by the by-laws; the number may be increased or decreased by amendment to the by-laws. The initial number of directors is, however, to be fixed by the articles of incorporation or at the organizational meeting and, if there is no by-law fixing the number, the number of directors will remain the same as the initial number. The 1933 Act provided for a minimum of three directors unless there were fewer than three shareholders, in which case the number of directors was required to be not less than the number of shareholders. The 1983 Act eliminates the need to tie the number of directors to the number of shareholders. Having less than three directors could be helpful in many situations, such as, for example, circumstances requiring immediate action or situations in which the terms of financing call for personal guaranties of every director or in which there is a legal requirement that every director belong to a particular profession.

Variable Range. Section 8.10 (b) of the 1983 Act provides that the by-laws may establish a variable range board by prescribing a minimum and maximum number of directors. There is no similar provision in either the 1933 Act, the existing Model Act or the Delaware Act. Under §8.10(b), while the maximum may not exceed the minimum by more than five, once the range has been established, the number may be changed from time to time within that range by directors or shareholders without further amendment to the by-laws. This provision is designed primarily for larger corporations in which it may be desirable for the board to have the authority to change its size without (in the case of corporations which have reserved to the shareholders the right to amend the by-laws) incurring the expense of calling a meeting to obtain shareholder approval.

This provision may also adjust the quorum to the majority of the directors then in office. As a result, it will allow the board to choose not to fill a vacancy (should one arise, for example; on the resignation of a director) without inhibiting board action by having a cumbersome quorum requirement. It will also allow the directors to add to the board for any desirable reason, such as when a particularly well-qualified person becomes available. The proposed 1983 Revised Model Act also provides in its §8.03(c) that the by-laws may establish a variable range board, but it includes an additional provision requiring shareholder approval to change the variable range size after shares are issued.

Terms. The term of each director expires at the next annual shareholders' meeting unless the terms are staggered as provided in §8.10(e) discussed below. The term of a director elected to fill a vacancy will expire at the next annual shareholders' meeting at which his predecessor's term would have expired. The term of a director elected as a result of an increase in the number of directors also expires at the next annual meeting, unless the term is staggered. If the corporations fails to have a shareholders' meeting or fails to elect directors at a shareholders' meeting because of a deadlock, the director will continue to serve until the next shareholders' meeting at which directors are in fact elected, despite expiration of his term. This provision for "holdover" directorships allows the management of the~corporation to continue uninterrupted. If the board votes to decrease the number of directors, even if within a permitted variable range, such vote will not shorten any incumbent director's term. The board cannot eliminate any one of its members, duly elected by the shareholders, until such director has served the full term to which he was elected. Provisions regarding directors' terms in the 1933 Act and the existing Model Act are the same with the exception that there is no provision for staggered terms in either act. The Delaware act states that each director shall hold office until his successor is elected and qualified or until his earlier resignation or removal. See also the 1983 Act's new §8.35 on removal of directors.

Classification. Section 8.10 (e) of the 1983 Act provides that if the board consists of six or more members the articles of incorporation or by-laws may provide that the board be divided into two or three classes, each to be as nearly equal in size to the others as possible. The 1933 Act did not provide for staggered terms. Under the 1983 Act, the term of the first class of directors is to expire at the first annual shareholders' meeting after election, the term of the second class is to expire at the second such meeting and the term of the third class, if any, is to expire at the third such meeting. At each annual shareholders' meeting after such classification, a number of directors equal to the number whose terms are expiring is to be elected to a two year term if there are two classes, or a three-year term if there are three classes. The existing Model Act specifies that there may be a staggered board if there are nine or more members. The Delaware Act provides generally for a staggered board with no required number of directors and no requirement that the classes be equal in size, but prohibits more than three classes.

The principal justification for a staggered board is to provide continuity in corporate affairs. It also reduces the impact of cumulative voting for the election of directors because a greater number of votes is required to elect a director if the board is staggered than if the entire board were elected at each annual meeting. The 1983 Act provides for cumulative voting, unless specifically limited or eliminated by the articles of incorporation, which is an additional factor to be considered when making the determination whether to classify the board of directors. The staggered board, together with a requirement that directors could be removed only for cause, has sometimes been used by incumbent management to inhibit unwanted takeover attempts. See, however, the 1983 Act's new §8.35 on removal of directors, which provides that directors may be removed with or without cause.

Voting By Classes Or Series Of Shares. Section 8.10 (f) of the 1983 Act is similar to the Delaware Act by providing that if the articles of incorporation authorize dividing the shares of the corporation into classes or series (see 1983 Act §6.10), the articles may also authorize the election of all or a specific number or percentage of directors by holders of any one or more of the classes or series of shares. Neither the 1933 Act nor the existing Model Act contained such authorization. The proposed 1983

Revised Model Act contains a provision identical to that in the 1983 Act. This type of provision is widely used on closely held corporations to ensure minority representation on the board of directors by issuing to the minority a class of shares entitled exclusively to elect one or more directors.

Resignation. Section 8.10 (g) of the 1983 Act provides that a director may resign at any time by giving written notice, to be effective when such notice is given unless it specifies a future date. The pending vacancy may be filled before the effective date, but the successor shall not take office until the effective date. There is no comparable provision in the 1933 Act or the existing Model Act. The Delaware Act provides that a director may resign at any time upon written notice to the corporation but does not specify when the resignation is to be effective.

Conflicts. Possible conflicts may be present with respect to authorizing a variable range of directors and a classified board when cumulative voting rights also exist. The reasoning of Wolfson v. Avery, 6 Ill. 2d 78, 126 NE 2d 701 (1955) , which held unconstitutional classified boards in view of the constitutional mandate for cumulative voting, is probably obsolete today because the 1970 Illinois Constitution contains no mandate for cumulative voting. See 1 Ill. Bus. Corp. Act Annot. at §35 (C. Murdock ed. 1975). For corporations having cumulative voting, charter amendments abolishing cumulative voting explicitly or implicitly (by creating non-voting shares), are common. However, for corporations organized before July 1, 1971 (the effective date of the 1970 Illinois Constitution), a question exists as to whether a charter amendment (unanimously approved by the shareholders) creating a class of non-voting shares in exchange for certain outstanding common shares (and thereby abolishing cumulative voting rights of the holders of such outstanding shares) is permissible under §8 of the Transition Schedule of the 1970 Illinois Constitution. See Roanoke Agency, Inc. v. Hartigan, No. 58735 (Ill. Sup. Ct., case argued January 25, 1984).

SECTION 8.15. QUORUM OF DIRECTORS.

This section provides, as did §37 of the 1933 Act and §40 of the existing Model Act, that unless a greater number is specified in the articles of incorporation or by-laws, the majority of the fixed number of directors constitutes a quorum. If the corporation has a variable range board of directors, as authorized by §8.10 (b) of the 1983 Act, the quorum consists of the majority of directors then in office, unless the articles of incorporation or by-laws specify a greater number. At no time may a quorum be less than the majority of the minimum number of directors specified by the variable range. There is no comparable provision for a variable range board in the 1933 Act, the existing Model Act or the Delaware Act.

Also under the 1983 Act, the act of the majority of directors present at a meeting at which a quorum is present constitutes the act of the board of directors, unless a greater number is required by the articles of incorporation. Furthermore, unless specifically prohibited by the articles of incorporation or the by-laws, the members of the board (or any committee of the board) may participate and act at any such meeting through the use of a conference telephone or other communications equipment by which all those participating can hear each other simultaneously. Participation in such a meeting constitutes attendance and presence in person. While this provision is the same as §43 of the existing Model Act and §141(i) of the

Delaware Act, it differs from §37 of the 1933 Act in that the 1933 Act required that the majority of members consent in writing to the recording of such communications, that the recording be in fact made and be made a part of the official corporate records. In practice, these provisions were found to be cumbersome. The recording of the meeting was found to be needlessly expensive and unnecessary because any action taken at the meeting i's otherwise reflected in the corporate minutes, regardless of whether spoken in person or by telephone. Also, some doubt has existed as to what constitutes becoming "part of the official corporate records" in the case of a tape recording. Moreover, the old requirement of written consent largely vitiated the convenience of the telephone meeting.

SECTION 8.20. PLACE OF DIRECTORS' MEETINGS.

This section makes no substantive change in §39 of the 1933 Act.

SECTION 8.25. NOTICE OF DIRECTORS' MEETINGS.

This section makes no substantive change in §40 of the 1933 Act.

SECTION 8.30. VACANCIES.

Any vacancy on the board of directors may be filled by election at an annual or special shareholders' meeting called for that purpose. This provision presents no change from the 1933 Act and reflects the inherent power of the shareholders to fill vacancies. A director elected by shareholders to fill a vacancy holds office for the balance of the term for which he was elected. The 1983 Act provides, in addition, that by-laws. may provide a method for the election of directors between shareholders-' meetings by director or shareholder action, and that in the absence of such a provision the board of directors may fill any vacancies that arise. The 1933 Act provided only that if authorized by the articles of incorporation, the majority of the board of directors then in office could properly fill a vacancy. The board could, however, appoint only one-third of the members in any twelve months. The 1983 Act does not place a restriction on the number of directors that may be appointed. A director appointed by the board to fill a vacancy serves, however, only until the next shareholders' meeting at which directors are to be elected. There are significant differences between §8.30 of the 1983 Act and the corresponding §223 of the Delaware Act, §38 of the existing Model Act and §8.10 of the proposed 1983 Revised Model Act.

A possible problem with respect to filling vacancies by board action may arise when cumulative voting exists. See comment to §8.10.

SECTION 8.35. REMOVAL OF DIRECTORS.

Although the 1933 Act had no provision to cover this topic, it has been generally recognized by the courts that directors may be removed for cause. This new section states that one or more directors may be removed with or without cause. While the majority of the outstanding shares entitled to vote at an election of the directors will be sufficient to remove a director, there must be a meeting of shareholders specifically called for the purpose of removing directors. The notice of the meeting must name the director(s) to be removed. However, a director elected by a class or series of shares may be removed only by holders of shares of that class or series. This provision is the same as §39 of the existing Model Act. It is also the same as §141 (k) of the Delaware Act (dealing with removal of directors elected by a particular class or series) which is limited to removal "without cause". The Delaware Act also provides that in cases in which the Board is classified (i.e., there are staggered terms) stockholders may effect removal of directors only for cause, unless the certificate of incorporation provides otherwise.

A charter or by-law provision denying the right of shareholders to remove a director, without or without cause, is intended to be invalid and against public policy.

Section 8.35 (a) (2) of the 1983 Act places an additional restriction on removal of a director from the board of a corporation which allows cumulative voting. If less than the entire board is to be removed, no director may be removed, with or without cause, if the votes cast against removal would be sufficient to elect the director if cumulatively voted at an election of the entire board of directors. These provisions guarantee that a minority faction with sufficient votes to elect one or more directors under cumulative voting or voting by class will be able to protect such director(s) from removal by the majority shareholder.

Both the existing Model Act and the Delaware Act further provide that if there are classes of directors, no director may be removed if votes cast against his removal would be sufficient to elect him if cumulatively voted at an election of the class of directors of which he is a part. The Delaware Act's provision is directed only to situations in which there is to be removal without cause.

Under the 1983 Act, the director may, however, be removed by court proceedings despite §8.35(a)(2). Section 8.35 (b) of the 1983 Act provides that §8.35 (a) does not preclude an appropriate circuit court from removing a director. The proceeding may be commenced by either the corporation or by shareholders holding at least 10$ of the outstanding shares of any class. A shareholder who owns fewer than 10% of the outstanding shares may bring a suit derivatively upon compliance with the requirements of §7.80 of the 1983 Act. If the court finds that (1) the director is engaged in fraudulent or dishonest conduct or has grossly abused his or her position to the detriment of the corporation, and (2) removal is in the best interest of the corporation, the court may order the director removed. The court may also bar the director from reelection for a specific period. There is no corresponding section on removal by judicial proceeding in the existing Model Act. However, the proposed 1983 Revised Model Act includes such a provision in its §8.09. The Delaware Act does not specifically address judicial intervention to remove a director for reasons of misconduct.

SECTION 8.40. COMMITTEES.

Under the 1983 Act, if the articles of incorporation so provide, the majority of the directors may create one or more committees and appoint members of the board to serve thereon. Each committee must have two or more members. The 1933 Act provided only that the majority of the board could designate two or more directors to constitute an executive committee. The 1983 Act makes Illinois law, the existing Model Act and the Delaware Act comparable (except the latter permits each committee to have one or more, rather than two or more, members).

Under the 1983 Act, unless the appointment by the board specifies a greater number, a majority of any committee constitutes a quorum. The majority of a quorum is necessary for committee action. A committee may, like the board, act by unanimous consent in writing without meeting.

This section of the 1983 Act makes explicit the common law power of a board of directors to act through committees of directors which serve important roles in the governance of publicly held corporations. Appropriate board committee action, within prescribed limits, is not only desirable but improves the functioning of large boards.

The statement of nondelegable functions in §8.40 (c) is based on the principle that prohibitions against delegation should be limited to prohibit only such actions as fall within the recognized province of the shareholders or might prove to be irrevocable (such as the declaration of a dividend).

SECTION 8.45. INFORMAL ACTION BY DIRECTORS.

Under the 1983 Act, unless specifically prohibited by the articles of incorporation or by-laws, any action which can be taken at a meeting of the board or a committee may be taken without a meeting if a consent in writing, setting forth the action taken, is signed by all directors entitled to vote on the matter. This section of the 1983 Act is the same as that in the 1933 Act except that it is applicable to all committees (not only the executive committee) and contains an additional provision that the action becomes effective when all directors entitled to vote have signed the consent. A single director, by withholding consent, may compel a meeting. The 1983 Act also requires that the signed consent be delivered to the secretary of the corporation to be filed in the corporate records. See §7.10 for the 1983 Act's different treatment of shareholder action by written consent which need not be unanimous.

SECTION 8.50. OFFICERS.

The 1983 Act eliminates specifically designated and traditional offices. Section 8.50 provides that a corporation shall have such officers as may be provided by the by-laws, each of whom shall be elected by the board of directors in the manner set out in the by-laws. If the by-laws so prescribe, any two or more offices may be held by the same person, which is a significant departure from the 1933 Act.

The 1983 Act, requires that one officer, in this Act generally referred to as the secretary, shall have the authority to certify the by-laws, resolutions of the shareholders and board of directors and committees thereof, and other documents of the corporation as true and correct copies. The person who is designated by the board as responsible for maintaining minutes of meetings and authenticating records of the corporation thereby has authority to bind the corporation by his authentication under this section. This delegation of authority, traditionally vested in the corporate "secretary", allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

At the end of §8.50, the 1983 Act distinguishes the concepts of express and implied authority and recognizes that officers and agents of the corporation may have both. Express authority is given by the by-laws and resolutions of the directors. Implied authority is that recognized by the common law from time to time and is relatively narrow in scope, in order to protect innocent third parties who do business with the corporation. The new provisions, which do not require specific officer titles, recognize the now common practice of designating officers more descriptively: chief executive officer, chief financial officer or otherwise, rather than using the traditional designations. The provision allows more freedom in designating the roles of executives and in allocating managerial power.

SECTION 8.55. REMOVAL OF OFFICERS.

This section is identical to §44 of the 1933 Act.

SECTION 8.60. DIRECTOR CONFLICT OF INTEREST.

In 1981 an interested director provision, §40A, was added to the 1933 Act, but the "fairness" concept was at the time rejected by the legislature. Section 40A set forth rules for determining which transactions between a director and the corporation, or in which a director has an interest, would be voidable. Section 8.60 of the 1983 Act entirely rewrites the conflict of interest rule. The concept of "fairness" has now been- added, and the issue of the burden of proof has been addressed. The 1983 Act establishes that if a transaction is fair to the corporation at the time it is authorized, approved or ratified, the fact that a director is directly or indirectly a party to the transaction is not grounds for invalidating it. A director is "indirectly" party to a transaction if the other party is an entity in which the director has a material financial interest or of which the director is an officer, director or general partner. The "fairness" of a transaction is to be evaluated by taking into consideration all the facts and circumstances known, or which should have been known, at the time the transaction was entered into. In most cases the transaction will be deemed “fair” if it might reasonably have been entered into at arms-length by disinterested persons. The provisions of this section are similar to those in §41 of the existing Model Act and §144 of the Delaware Act. The proposed 1983 Revised Model Act is identical to the 1983 Act, except that it covers transactions involving officers as well as directors.

Section 8.60 states that if a transaction is fair to a corporation at the time it is authorized, approved or ratified, the transaction is not void or voidable solely because the directors approving it have a conflict of interest, or because an interested director is present or participates in a meeting or because his vote counted for that purpose. However, the person or persons asserting fairness (i.e., the interested director or directors) have the burden of proving that the transaction was fair to the corporation, unless certain requirements are met. In order to avoid the burden of proof being placed. on the person or persons asserting fairness, there must have been (a) full disclosure of the material facts of the transaction and the director's interest therein to the approving board, committee of the board or shareholders, and (b) approval of the transaction by either the disinterested members of the board, or committee, or by shareholders, without, however, counting the vote of any shareholder who is an interested director. Interested directors may be present and their presence may be counted to establish a quorum, but their votes may not be counted for action on the transaction. The limitation prohibiting the counting of votes of a shareholder who is an interested director was added by the legislature by amendment and did not originate with the Advisory

Committee. However, the legislature did not provide that the vote of an interested shareholder who is not a director should not be counted.

Once the transaction has been authorized, approved or ratified by disinterested directors, or by disinterested shareholders, the burden shifts to those contesting the validity of the transaction to prove its unfairness. Under case law in Illinois, fairness is a test, but a large number of court decisions have produced various results and standards. Section 8.60 should resolve the conflict and should provide a uniform standard.

SECTION 8.65. LIABILITY OF DIRECTORS IN CERTAIN CASES.

This section is intended to retain the substance of §§42 and 44 of the 1933 Act, but to conform the language to the new financial concepts embodied in §§9.05, 9.10 and 12.75 of the 1983 Act. Section 8.65 (a) provides that in addition to any other liabilities imposed by law upon directors, they will be held liable to the corporation or to creditors under certain circumstances. For example, directors who vote for or assent to any distribution prohibited by §9.10 will be held jointly and severally liable to the corporation for the amount of the distribution. Section 9.10 prohibits distributions to shareholders if, after giving effect to the distribution, the corporation would be insolvent, either in an equitable sense (i.e., unable to pay its obligations as they mature) or in a balance sheet sense (i.e., net assets would be less than the value of liabilities plus the maximum amount payable at the time of distribution on preferred shares, if the corporation were then liquidated).

Section 8.65 (c) provides that a director is not liable for a distribution of assets in excess of the amount authorized by §9.10 if the director relied in good faith upon a balance sheet and profit and loss statement represented to be correct by the officer of the corporation having charge of the books of account or by independent accountants. The director is also not liable if, in determining the amount available for any such dividend or distribution, he or she, in good faith, considered the assets to be of their book value. The concept of "good faith" is addressed in §172 of the Delaware Act and in §8.33 of the proposed 1983 Revised Model Act.

The 1983 Act also provides that directors who fail to take reasonable steps to cause notice of the dissolution of the corporation to be given to known creditors of the corporation, as required by §12.75 of the 1983 Act, are jointly and severally liable to the creditor for any loss or damage occasioned by the lack of notice. The notice must be sent within 60 days of the effective date of dissolution and specify where and by what deadline claims must be submitted. Further, a director of a corporation which carries on business, other than for purposes of winding up, after filing articles of dissolution with the Secretary of State is jointly and severally liable to creditors of the corporation for all debts and liabilities incurred in carrying on the business.

Section 8.65 (b) of the 1983 Act, like the 1933 Act and many other similar statutes, provides that a director who is present at a meeting at which action on any corporate matter is taken is conclusively presumed to have assented to the action taken unless there is a written record of the director's dissent. See 1933 Act, §42.9; proposed 1983 Revised Model Act, §8.24(d); Delaware Act, §174(a). The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. A director who actually voted in favor of an action cannot, however, exonerate himself or herself after the fact by filing a written dissent.

The 1983 Act, as well as the other statutes referred to above, provides that any director against whom a claim is asserted under §8.65 and who is held liable is entitled to contribution from the other directors who are also liable and from shareholders who accepted or received such distribution knowing it to be in violation of the statute. Other than providing that the shareholders' contribution is to be in proportion to the amount received by them, respectively, the section is silent on how the obligations and benefits arising from its application are to be apportioned among directors and shareholders.

Finally, the 1983 Act has eliminated the provision found in the 1933 Act that a director who assented to a dividend or distribution of assets of the corporation to shareholders as prohibited by the statutes would be guilty of conspiracy. Under the 1983 Act, upon conviction, the director would be subject to punishment (including a fine or imprisonment) as provided in §8-2 of the Criminal Code of 1961.

SECTION 8.70. KICKBACKS, BRIBES, ETC. -- LIABILITY OF OFFICERS AND DIRECTORS.

This section of the 1983 Act changes the provision from the 1933 Act only slightly by tying the prohibited activity to the provision in Article 29A of the Illinois Criminal Code dealing with commercial bribery and commercial bribe receiving. This provision appears to be unique to Illinois.

SECTION 8.75. INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS; INSURANCE.

The 1933 Act was amended in 1977 by the addition of §42.12 which provided for the first time that a corporation by statute could indemnify its officers, directors, employees and agents. The provisions adopted in 1977 made the Illinois statute virtually the same as the Delaware Act. Section 8.75 of the 1983 Act retain all of §42.12 of the 1933 Act, and adds three new sections,(h) through (j). Section 8.75 (h) requires the corporation to report to the shareholders any indemnification payments it has made. Section 8.75(i) extends possible indemnification to officers, directors, employees and agents of corporations involved in a merger which did not survive the merger. Section 8.75(j) makes it clear that indemnification can extend to liabilities imposed by the Employee Retirement Income Security Act of 1974 and similar legislation.

Section 8.75 (a) now provides that in a nonderivative action the corporation may indemnify a director, officer, employee or agent for expenses (including attorneys' fees), judgments and fines, actually and reasonably incurred, if such person acted in good faith and in a manner not opposed to the best interests of the corporation. With respect to a criminal proceeding, the individual must have had no reasonable cause to believe his or her conduct was unlawful. Section 8.75 (b) provides in a derivative action the corporation may indemnify against expenses (including attorneys' fees) actually and reasonably incurred subject to the same standard of conduct as in a nonderivative action. No indemnification is permitted if the person is found to be liable for negligence or misconduct in performance of his or her duty to the corporation.

Section 8.75 (c) which, unlike §§8.75 (a) and 8.75 (b) , is mandatory, not optional, provides that an individual shall be indemnified to the extent he has been successful on the merits or otherwise. The "to the extent that" language allows the indemnification to be allocated to partially successful defenses or claims and also allows indemnification if an individual prevails in a preliminary technical defense. It is not required that an individual continue with what might prove to be an expensive proceeding on the merits.

In order for any indemnification under §§8.75(a) and 8.75 (b) to be authorized (except for a court-ordered indemnification) there must first be a determination that the individual has met the applicable standard of conduct. Such a determination can be made by the board (by a majority of a quorum of disinterested directors), by written opinion of independent legal counsel (as requested by a quorum of disinterested directors), or by the shareholders. once the determination has been made, the board, a committee of the board, or the shareholders can authorize the indemnification.

Section 8.75 (e) provides that an individual faced with a suit for which indemnification might be appropriate may receive an advance for expenses. In a complex proceeding, adequate legal representation and adequate preparation of a defense may require substantial payments of expenses before a final determination. A defendant of limited means may be unable to finance a defense without such an advance. An advance may be authorized by the board upon receipt of an undertaking by or on behalf of the individual to repay. There is no statutory requirement that the undertaking be; secured or that financial ability to repay be required.

Section 8.75 (f) is a "non-exclusive" clause which states that. the statute does not invalidate a payment or agreement of indemnification simply because the payment or agreement does not parallel, or goes beyond, the language or substance of the statute.

New provision §8.75(h) of the 1983 Act requires that if a corporation has paid indemnity or has advanced expenses, it must so report in writing to the shareholders with or before the notice of the next shareholders' meeting. This provision is not found in either the existing Model Act or the Delaware Act.

New §8.75(i) empowers the surviving or resulting corporation after a merger to provide continuing indemnity for those individuals covered before the merger. New §8.75 (j) addresses the question of liabilities arising when an individual is serving as a fiduciary of an employee benefit plan. Even though the legal standards governing fiduciaries generally are strict and require discharge of duties "solely in the interest" of beneficiaries, this section makes it clear that fiduciaries will nevertheless be also viewed' as acting as directors, officers, employees or agents of and on behalf of the corporation. A person so acting in good faith can be deemed to have acted in a manner "not opposed to the best interest of the corporation" and is entitled to be considered for indemnification under the foregoing provisions. This provision appears in the proposed 1983 Revised Model Act and in the Delaware Act.

GENERAL COMMENTS TO ARTICLE 9.

Article 9 of the 1983 Act reflects a complete revision of all provisions of the 1933 Act concerning financial matters, including (a) the elimination of the concept of treasury shares, (b) the inclusion of dividends, share repurchases, liquidations, and similar actions which will be governed by the same standard, in a liberalized definition of a corporation "distribution", and (c) a realignment of the standards imposed on a corporation's board of directors in authorizing corporate distributions. In addition, certain sections of the 1933 Act, which conflict with the statutory scheme of Article 9 of the 1983 Act, were eliminated. Those sections of the 1933 .Act concerned with financial matters specifically repealed are: §59 - Redemption and Cancellation of Shares; §58a - Cancellation of Reacquired Shares; §59 -Reduction of Stated Capital in Certain Cases; §60 - Regulations Governing Reduction of Stated Capital; and §60b - Limitation on Reduction of Stated Capital and Paid-In Surplus.

SECTION 9.05. POWER OF A CORPORATION TO ACQUIRE ITS OWN SHARES.

As a general rule under the 1933 Act, a corporation could have only acquired its own shares out of earned surplus. Five limited exceptions to the general rule were the acquisition of shares for retirement of redeemable shares, eliminating fractional shares, paying dissenters, collecting or compromising claims of the corporation, and partial liquidations.

The 1983 Act broadly empowers a corporation to acquire its own outstanding shares and to treat them as authorized but unissued shares once acquired, subject only to (i) restrictions, if any., contained in the corporation's articles of incorporation, and (ii) the financial limitations of §9.10, discussed below, which replaces §§41 and 41a of the 1933 Act.

Section 9.05 of the 1983 Act, which is similar to §6.31 of the proposed 1983 Revised Model Business Corporation Act, must be considered in light of the abolition of the concept of treasury shares. See discussion under §2.10. Section 9.05 specifies that once issued but reacquired shares of a corporation become authorized but unissued shares of that corporation without further action, unless the articles of incorporation prohibit reissuance, in which case the reacquired shares are cancelled and the number of authorized shares is reduced by the number of shares acquired. Section 9.05 (c) of the 1983 Act provides a simplified means of making an official filing if, by virtue of provisions in the articles of incorporation, the authorized number of shares has been reduced by an acquisition. This provision is included in order to maintain a public record of the actual authorized number of shares of a corporation. Since §9.05(b) relates only to the present and future, treasury shares in existence at the 1983 Act's effective date may remain such until they are transferred or retired. This interpretation means that corporations with treasury shares at July 1, 1984 need not at that point file reports to cancel such shares.

SECTION 9.10. DISTRIBUTIONS TO SHAREHOLDERS.

Under the 1933 Act distributions were covered in three separate sections: §6 relating to distributions by share purchase, §41 relating to distributions by dividends, and §41a relating to distributions in partial liquidation. It establishes the fundamental test for determining the legality of all such transactions and any other transaction which, entails a transfer of money or other property by a corporation to any shareholder.

Section 9.10 does not mandate any minimum legal capital concept. The test of the legality of a distribution to shareholders is no longer based upon the traditional "par value" and "stated capital" limitations. Instead, the new test of the legality of a distribution to shareholders is governed to some extent by the collective business judgment of the corporation's board, of directors- The 1983 Act prohibits distributions to shareholders if, after giving effect to the distribution, the corporation would be insolvent, either in an equitable sense or in a legal sense. The advisory committee believed the new provisions do not mean that par value and stated capital are now illegal. They are merely not required. Any corporation currently operating on the basis of these concepts may continue operating in that manner. A corporation may also convert to the system of distributions set forth in §9.10 without being required to abolish or change the par value of any of its shares.

In determining whether or not a corporation is (or as a result of a proposed distribution would be) rendered insolvent under the equity insolvency test, the board of directors of the corporation must exercise its business judgment as to whether making the distribution in question will render the corporation unable to pay its debts as they become due in the ordinary course of its business operations.

Basically, the equity insolvency test permits directors to conduct a good-faith, cash flow analysis based on available information to permit a conclusion that known obligations to the corporation as a going concern can reasonably be expected to be satisfied over the period of time that they will mature. This contrasts with a measurement of current assets against current liabilities or a determination that the present estimated “liquidation” value of the corporation’s assets would produce sufficient funds to satisfy the corporation’s existing liabilities.

The second test in determining the propriety of a distribution is the legal insolvency or the "balance sheet" test. The balance sheet test requires that, after giving effect to any distribution, the corporation's assets would equal or exceed its liabilities and liquidation preferences on senior equity. The 1983 Act clarifies uncertainties present in many jurisdictions concerning the permissible way to determine the value of assets and liabilities. Section 9.10 (d) permits the directors to base their determination that the distributions passes the balance sheet test upon either (i) financial statements prepared using accounting practices and principles that are reasonable in the circumstances, or (ii) a fair valuation or other method that is reasonable in the circumstances.

Implicit in the issue of the legality of a corporate distribution under the balance sheet test is the method of valuation of corporate assets and liabilities. Should the value of a corporation's assets be equal to the book value determined in accordance with generally accepted accounting principles, or to the actual market value? There is case law which dictates that directors are under the duty to evaluate assets on the basis of acceptable data and by standards which they are entitled to believe reasonable to reflect present or appraised values as opposed to historical cost values of the corporation's assets as reflected on its financial statements prepared in accordance with generally accepted accounting principles. See, e.g., Morris v. Standard Gas & Electric Corp., 63 A. 2d 577 (Del. Ch. 1949), Bishop v. Prosser-Grandview

Broadcaster, Inc., 472 P.2d 560 (Wash. App. 1970), Kettle Fried Chicken of America, Inc., 513 F2d 807, (6th Cir. 1975).

Section 9.10 (d) of the 1983 Act places Illinois squarely with those jurisdictions permitting directors to rely in good faith upon an accountant's or appraiser's opinion as to the present value of a corporation's assets.

Section 9.10 (e) specifies the time at which the two tests imposed by §9.10 (c) should be measured. Where the distribution is by purchase, redemption, or other acquisition of the corporation's shares, the date approximating the earlier of the payment date or the date the shareholder ceases to be a shareholder with respect to such shares is used as a measuring date. In all other distributions, if payment occurs 120 days or less from the date of authorization for such distribution, the date of the authorization is to be used; if payment occurs more than 120 days following the date of authorization by such distribution, then a date approximating the payment date is to be used.

In the absence of a fixed record date by the board of directors (see §7.25), §9.10 fixes the record date for distributions, other than those involving the corporation's repurchase of its shares, as the date the board authorizes such distribution.

SECTION 9.15. REDUCTION OF PAID-IN CAPITAL.

Section 60a of the 1933 Act sets forth the circumstances in which paid-in surplus may be reduced. Section 9.15 of the 1983 Act broadens these circumstances to conform with the liberalized "distribution" concept contained in 59.10. A separate method of reducing paid-in capital for franchise tax purposes is specified in §14.25. See discussion under §14.25. Sections 9.10 and 9.15 do not overlap with respect to paid-in capital distributions. Section 9.10 contains the standards for all corporate distributions, while §9.15 deals only with those distributions which may be charged to paid-in capital.

SECTION 10.05. AUTHORITY TO AMEND ARTICLES OF INCORPORATION.

Section 10.05(a) of the 1983 Act rewrites §52 of the 1933 Act to conform generally with other changes. Section 52 of the 1933 Act had set forth the general right to amend articles of incorporation and §§52.1 - 52.19, incl., had set forth specific provisions which may be amended. Section 10.05 repeals these latter sections as unnecessary.

The change reflects a preference in the 1983 Act to be more general where possible. A broad authorization to amend the articles is consistent with this view while the "laundry-list" approach of §§52.1 - 52.19, incl., of the 1933 Act is not. The revision will not diminish any rights of a corporation to amend its articles.

Section 10.05 (b) is new. A corporation may revive its duration after expiration if it amends its articles within five years thereafter to make its duration perpetual or for a shorter duration. Section 2.10 (d) of the 1983 Act eliminates this problem for a new corporation by making a corporation's duration perpetual unless otherwise provided in its articles of incorporation.

SECTION 10.10. AMENDMENT BEFORE ISSUANCE OF SHARES.

Section 10.10 of the 1983 Act is new. It authorizes incorporators or directors to adopt amendments to the articles of incorporation during a corporation's early existence or if it were incorporated and lay dormant before any shares were issued. Section 10.10 recognizes that occasionally there is a need to amend the articles before shareholders exist in order to correct minor defects or to handle slight factual changes. This provision has a limited application but should be useful.

SECTION 10.15. AMENDMENT BY DIRECTORS.

Section 10.15 is new. It authorizes directors to adopt amendments to the articles of incorporation for limited purposes only: to delete the names of the initial directors or a registered agent, to split shares if no class or series is adversely affected, to make minor changes in the corporate name, to reduce authorized shares, and to restate the articles of incorporation.

Illinois corporate law has always required all amendments to the articles to have shareholder approval which entails a board resolution, notice to the shareholders of the nature of the amendment and of their right to vote thereon, and a meeting at which such vote is taken or action is approved by a unanimous consent of shareholders. The rationale for §10.15 is that some kinds of amendments are of such a minor nature that time-consuming and costly shareholder action is not needed. Directors should be given the authority to adopt such minor amendments, so long as the rights and the ownership interests of the shareholders will not be adversely affected.

SECTION 10.20. AMENDMENT BY DIRECTORS AND SHAREHOLDERS.

Section 10.20 of the 1983 Act details the traditional method to amend the articles of incorporation. It was the only authorized method under the 1933 Act. The directors first adopt the proposed amendment and then submit it to the shareholders for their approval. An affirmative vote of two-thirds of the outstanding shares is required for the amendment to be adopted.

However, §10.20 of the 1983 Act adds provisions to conform to other changes: (a) non-voting shares may or may not be entitled to vote on amendments, depending on the terms of such shares, and (b) if any amendment would give any class the right to dissent and appraisal, notice of such dissenters' rights must be sent to the affected shareholders. Amendments still are required to receive a two-thirds affirmative vote unless the articles of incorporation authorize approval by a smaller or larger vote requirement (but not less than a majority) of the outstanding shares entitled to vote on such amendment.

Section 10.20 is consistent with the other changes reflected in the 1983 Act, which authorize non-voting shares, expand and modify dissenters' rights, and permit majority shareholder voting (compared to the mandatory two-thirds vote in the 1933 Act). See discussion as to authority to amend articles of amendment to provide for smaller or larger vote requirement (but not less than a majority) in comment to §11.20.

SECTION 10.25. CLASS VOTING.

If there are classes of shares, §10.25 of the 1983 Act (as did §54 of the 1933 Act) may require approval by a majority of shareholders within a class when the proposed amendment would affect the rights and interests of such class. Section 10.25 also lists specific matters which always require class voting.

Section 10.25 of the 1983 Act eliminates references to par value, and the right to vote by class has been extended to amendments which create a new class of shares with rights substantially equal to those of another class or which limit or deny voting rights of the class.

Changes in this section expand the rights of holders of classes of stock. Other revisions are technical in nature.

SECTION 10.30. ARTICLES OF AMENDMENT.

All information required to be set forth in the articles of amendment is listed in §10.30 of the 1983 Act. Information is required if the amendment is adopted by incorporators or by directors, but §10.30 substantially rewrites §55 of the 1933 Act to simplify information and to eliminate reporting of share voting. Execution, verification, filing and recording of all documents are now covered by §1.10 of the 1983 Act.

Revisions made are technical ones necessitated by other changes made in other sections of the 1983 Act.

SECTION 10.35. EFFECT OF CERTIFICATE OF AMENDMENT.

Section 10.35 of the 1983 Act for the first time authorizes the corporation to set an effective date of an amendment of the articles to be other than the date the certificate of amendment is issued by the Secretary of State but not more than 30 days thereafter.

Many states permit a corporation to set the effective date of amendments. This provision helps corporations to coordinate complex or multi-state transactions and to give desired tax or accounting effects to changes in status.

SECTION 10.40. AMENDMENT PURSUANT TO REORGANIZATION.

Section 10.40 of the 1983 Act shortens and streamlines provisions for an amendment to the articles ordered by a court pursuant to a plan of reorganization. No substantive provisions are changed from §55.1 of the 1933 Act, except that shareholders are not entitled to dissenters' rights except to the extent provided in the reorganization plan. The list of specific provisions which may be amended is eliminated and replaced by a general authorization clause. The changes are primarily editorial to modernize the language.

SECTION 11.05. PROCEDURE FOR MERGER OR CONSOLIDATION.

This section combines §§61 and 62 of the 1933 Act. The consideration which may be used in merger or consolidation has been expanded to include securities, cash, other property, securities of the corporate parent, or any combination of the foregoing. The 1933 Act limited consideration to stock or other securities of the surviving corporation or its parent (except in the case of a 99$ subsidiary merger under §66a of the 1933 Act).

The addition, which is similar to §11 of the proposed 1983 Revised Model Business Corporation Act and §251 of the Delaware Act, brings Illinois into conformity with modern, flexible corporate practice. Further, the capitalization of the surviving corporation may be restructured in the merger, or its articles of incorporation may be amended by the articles of merger.

Section 11.05 permits maximum flexibility in the negotiation and consummation of a merger. Adoption of this section evidences a generally favorable attitude towards business combinations.

The 1983 Act contains expanded, flexible provisions covering dissenters' rights and the procedure to dissent in §§11.65 and 11.70. Normally, it is expected that the courts would remit a dissenting shareholder to his statutory appraisal remedy, rather than granting injunctive relief. However, judicial remedies exist to prevent over-reaching in any merger situation where a party to a merger is "interested" in the transaction, such as, for example, where a subsidiary is merged into a parent. The courts have generally insisted that the interested party must assume the burden of proving the fairness of the transaction. Where the other party or parties to a transaction are not "interested", the courts will generally not try to upset the transaction, except in the cases where the merger is fraudulent to the shareholder. Under §11.65(b), a shareholder who is entitled to dissent and obtain payment for his or her shares, may not challenge the corporate action creating his or her entitlement unless the action is fraudulent with respect to the shareholder or the corporation or constitutes a breach of a fiduciary duty owed to the shareholder. See comment to §8.60. The procedure for merger or consolidation is found in §§11.05, 11.15, 11.20, 11.25, 11.40, and 11.45 of the 1983 Act instead of §11.05 alone.

SECTION 11.10. PROCEDURE FOR SHARE EXCHANGE.

This section, which has no antecedent in the 1933 Act, introduces a new concept of a mandatory share exchange under which all the shareholders of a corporation would be obligated to exchange their shares for stock, cash, or other property delivered to them by the acquiring corporation upon the requisite vote of shareholders of the first corporation. Non-consenting shareholders will be entitled to dissenters' rights (see §11.65). The Revised Model Act (§11.02) has adopted the share exchange concept, which is another means of accomplishing the financial results of merger. It has the advantage that the acquired corporations do not disappear and thereby cause possible legal difficulties and uncertainties under franchises and in contracts to which such corporation is a party. It will eliminate the need in many cases for the reverse triangular merger under which the acquiring corporation forms a subsidiary which is then merged into the acquired corporation and for a regular triangular merger in which the acquired corporation is merged into a subsidiary of the acquiring corporation. The same dissenters' rights protection is available under a share exchange as under a merger. The last paragraph of §11.10 is designed to make it clear that the mandatory exchange provided by the section does not affect the power of corporations to acquire shares by voluntary exchange or otherwise by agreement with the shareholders.

Although the share exchange appears to be an attractive way of making an acquisition without disturbing contractual, franchise, and other relationships of the acquired corporation, it may still be necessary to examine such contracts to ascertain whether the drafters of such documents anticipated the possibility of a share exchange just as the drafters frequently now anticipate the possibility of a merger. Moreover, in franchise or lease agreements, a termination of franchise or lease is often triggered by a change in the ownership of a majority of the equity of a party to the agreement. Customarily, cable TV franchises require permission, for example, before ownership is transferred. In such a case a share exchange may be no more attractive than a merger.

Counsel is urged to consider whether a share exchange would be a tax-free transaction under §368 of Internal Revenue Code if there were any dissenters demanding cash. A "B" reorganization requires an exchange of stock <u>solely</u> for voting stock. If cash is paid the dissenter, perhaps the reorganization would not qualify as a "B" reorganization. It is also unclear whether a share exchange is covered by Rule 145 promulgated under the federal Securities Act of 1933 and whether the "pooling" accounting treatment would apply in the event of a share exchange.

SECTION 11.15. CALL OF SHAREHOLDERS' MEETING.

Section 11.15 broadens §63 of the 1933 Act by providing for call of a shareholders' meeting to apply to share exchanges as well as mergers and consolidations. Section 63 of the 1933 Act specified that a meeting of shareholders be called by the directors to consider a merger and required at least 20 days notice. Either a copy or a summary of the plan of merger or plan of consolidation shall be included with the notice under §11.15. Details of the time and manner of notice are not included since they are covered by §7.15. No notice is required to be given to shareholders of the surviving corporation if they are not required or entitled to vote on a plan (i.e., in a subsidiary merger under §11.30 the shareholders of the acquiring corporation would not be entitled to notice just as under §66a of the 1933 Act, shareholders of a surviving corporation in a subsidiary merger would not be entitled to notice or to vote on the proposition).

Section 11.15 requires that the notice inform shareholders of dissenters' rights and enclose a copy of §11.70 or otherwise provide adequate notice of the procedure to dissent. It is designed to forestall the possibility that a shareholder will inadvertently ignore his dissenters' rights and vote for a merger or share exchange and, thereby, vitiate such rights. Notice must be given even to shareholders not entitled to vote because the notice serves the purpose of advising all non-voting shareholders that the corporation is considering a fundamental transaction that may affect all interests in the corporation.

SECTION 11.20. APPROVAL BY SHAREHOLDERS.

This section revises §64 of the 1933 Act, which required the affirmative vote of the holders of at least two-thirds of shares entitled to vote on the issue in favor of a merger. The two-thirds rule is retained in §11.20 for corporations generally, but the articles of incorporation may specify any larger or smaller vote requirements not less than a majority. No vote is required by shareholders of the surviving corporation unless required by its articles of incorporation, if the merger doesn't change the articles, and if the stock of the surviving corporation issued in consequence of the merger is common stock and does not exceed 20% of the common stock outstanding immediately prior to the effective date of the merger.

No abuse has been reported in states which permit a majority vote rather than a two-thirds vote to approve a merger. The vote requirement in this section and other sections in the 1983 Act relating to organic acts of the corporation is a compromise between the present two-thirds requirement of Illinois law and the majority requirement of many states such as Delaware (§251 of the Delaware Act). Existing Illinois corporations would require a two-thirds vote in order to amend the articles of incorporation to permit a lesser majority thereafter.

Section 11.20 (c) is premised on the theory that shareholders' votes should be required only if the transaction fundamentally alters the character of the enterprise or substantially dilutes the shareholders' participation in voting or profit distribution. The transactions for which shareholder approval is not required by §11.20 (c) do not alter the shareholders' prospects any more than many other management decisions, and, therefore, would not require a shareholder vote. The 20% requirement is consistent with the statutes of a number of states including Delaware, Michigan, and Pennsylvania and also with the New York and American Stock Exchange listing requirements. However, a shareholder vote will be required if a corporation must amend its articles to increase the number of authorized shares in order to issue the 200 or less new shares. If for any reason a shareholder vote is required, the statutory provisions under dissenters' rights in §§11.65 and 11.70 apply. If no shareholder vote is required, there are no dissenters' rights.

Section 11.20 also makes it possible to require by appropriate amendment to the articles of incorporation a vote by classes on the merger even though the class would not otherwise be entitled to vote by class on the issue.

Since the advent of the triangular merger in recent years, the vote of shareholders in an acquiring corporation has often been dispensed with, even when more than 20% of the outstanding stock is to be issued in consequence of the merger. Typically, the acquiring corporation (P) will by director action, if the number of authorized but unissued shares is sufficient to permit it, transfer to a new subsidiary (S) the shares to be used in the final merger in exchange for S's stock. S then merges into the target company, (T), or T merges into S. In neither merger are the shareholders of P entitled to vote or to dissenters' rights, even if both steps of the transaction are closely related in time and are actually contemplated at the time the first transfer of P stock is made to S in exchange for its shares. There are many reasons for a triangular merger other than the possible desire to deprive P's shareholders of their vote and their dissenters' rights. T may be a corporation which because of contractual, franchise or tax reasons should be the surviving corporation in a merger transaction even though it is desired that P be the acquiror. Triangular mergers and reverse triangular mergers have been permitted under the 1933 Act for several years.

SECTION 11.25. ARTICLES OF MERGER, CONSOLIDATION OR EXCHANGE.

Section 11.25 expands §65 of the 1933 Act to include share exchange. The articles of merger no longer need set forth specifically the number of shares outstanding and the number of shares voted for and against the plan. The articles merely need to state that the plan was adopted at a meeting of shareholders by the affirmative vote of the holders of outstanding shares having not less than the minimum number of votes necessary to adopt the plan. Section 11.25 (a) (2)(ii) indicates that the plan may be adopted by written consent of holders of outstanding shares having not less than the minimum number of votes necessary to adopt the plan if permitted by the articles of incorporation of the respective corporation. Previously, unless all of the shareholders signed the consent, the vote had to be taken at a meeting. The procedure in the 1983 Act is simplified.

In recent years, there has been a certain degree of controversy with respect to "cash-out" mergers on the basis that such devices can be used to disadvantage minority shareholders. On the other hand, in times of inflation and high interest rates, a low fixed-interest rate, debt security, which presently is authorized, can also be disadvantageous to minority shareholders. Accordingly, the Advisory Committee believed that the potential for injury to minority shareholders should be a matter for the courts through their oversight of fiduciaries and that the statutory approach should be flexible.

SECTION 11.30. MERGER OF SUBSIDIARY CORPORATION.

This section revises §66a of the 1933 Act, which provided for short-form mergers of 99%-owned subsidiaries in exchange for stock or securities of the parent or cash. It contains elaborate dissenters' rights provisions which differed in unimportant respects from the general dissenters' rights provisions enumerated in §70 of the 1933 Act. The 1983 Act reduces the shareholders' percentage for subsidiary merger from 99% to 90% and eliminates specification of filing requirements under §11.30 because these are provided in §1.10. However, §11.30 contains a 30-day notice requirement and permits merger for stock, securities, cash or other property or any combination of consideration.

The 90% requirement makes Illinois law comparable to the laws in many other states, permitting more corporations to use short-form mergers. The use of "other property" and combinations of property and cash and stock for consideration conforms with the changes in ordinary mergers specified in §11.20. Similarly, the requirements of notifying shareholders of dissenters' rights parallel those of §11.65, which consolidates the provisions for dissenters' rights in one place in the 1983 Act.

SECTION 11.35. MERGER, CONSOLIDATION OR SHARE EXCHANGE OF DOMESTIC AND FOREIGN CORPORATIONS.

This section adds provisions to §69a of the 1933 Act. Section 11.35, like §69a of the 1933 Act, specifies the effect of a merger of a domestic and foreign corporation, and if the foreign corporation is the survivor, it obligates the foreign corporation to provide Illinois dissenters' rights for the domestic corporation's shareholders. In this respect, §11.35 does not change the law in any material respect, but it adds provision for share exchanges authorized in §11.10 paralleling those of mergers. Since foreign corporations are governed by foreign law, the shareholders of a foreign corporation which is a party to a merger may not have dissenters' rights even though they would have such rights if the foreign corporation were a domestic Illinois corporation.

SECTION 11.40. EFFECTIVE DATE OF MERGER, CONSOLIDATION, OR EXCHANGE.

This section changes §67 of the 1933 Act by which a merger became effective when filed with the Secretary of State. Under §11.40 of the 1983 Act, a merger, consolidation, or share exchange may become effective on a specified date, not earlier than the date of. filing with the Secretary of State nor later than 30 days after filing. Many states permit a delayed effective date, which is desirable frequently for legal, tax, and accounting reasons. There is no discernible public policy reason for requiring effectiveness at the time of filing, and, for mergers, consolidations, and share exchanges involving foreign and domestic corporations, the effective time of the merger under, the 1933 Act would require simultaneous filings with the Secretaries of State involved. Such filings might be impossible, particularly in view of the fact that some states require a certified copy of the articles from other states involved at the time of filing. The delayed effective date will be helpful because it permits the effectiveness to take place at a time convenient for the merged entity such as the end of a fiscal year.

SECTION 11.45. RECORDING OF CERTIFICATE AND ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE.

This section expands §68 of the 1933 Act. In addition to providing for a mechanism for recording articles of incorporation, §11.45 provides for the recording of articles of share exchange in the county where the registered office of the acquired corporation is situated.

SECTION 11.50. EFFECT OF MERGER, CONSOLIDATION, OR EXCHANGE.

This section expands §69 of the 1933 Act. Section 11.50 adds share exchanges to this section on the effect of merger or consolidation specified in Section 69 of the 1933 Act. Section 11.50 (b) is specific in setting forth the legal effect of the transaction upon the` shares being acquired. Except for dissenters' rights under §11.70, the shareholders of the non-surviving or acquired corporations are entitled only to the money, securities or other property set forth in the plan. The other provisions of §69 of the 1933 Act are unchanged.

SECTION 11.60. SALE, LEASE OR EXCHANGE OF ASSETS, OTHER THAN IN USUAL AND REGULAR COURSE OF BUSINESS.

This section modifies §72 of the 1933 Act, which required a two-thirds shareholders' vote to authorize a sale, lease, exchange, mortgage, pledge, or other disposition of all or substantially all of the property and assets of a corporation if not made in the usual and regular course of its business.

Section 11.60 of the 1983 Act does not apply this requirement to a mortgage or pledge of assets. However, it requires notice to all shareholders, whether or not entitled to vote, on a sale, lease or exchange of all or substantially all assets, other than in the usual and regular course of business. This section provides that the vote required may be a majority vote if so specified in the articles of incorporation. The requirement of a shareholder vote on mortgage or pledge of assets has been eliminated because such a mortgage or pledge frequently is required in connection with financing transactions. The 1933 Act requirement was a trap for the unwary. This section has also been modified for the contingency that there may be shares not entitled to vote on the issue and for the possibility that the articles of incorporation may change the two-thirds voting requirement downwards. See comment on §11.20 as to the required shareholder vote.

SECTION 11.65. RIGHT TO DISSENT.

This section replaces S§66a, 70, and 73 of the 1933 Act, which provided for various dissenters' rights in subsidiary mergers, other mergers, and sales of assets, respectively. The new provision substitutes an expanded and more comprehensive set of rules for dissenters' rights. The preamble adds the words "to obtain payment", to indicate more clearly that the section deals not only with the right to dissent but also the right to obtain payment. Dissenters' rights are extended to share exchanges and to changes in rights of shareholders by amendment to the articles of incorporation when such amendments impair share rights. Grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered. It also enhances the freedom of the majority to make changes because the existence of an "escape hatch" can make fair and reasonable a change which might be unfair if it forced a fundamental mutation of rights upon unwilling investors without giving them a reasonable alternative. Thus, a shareholder with dissenters’ rights may not challenge corporate action unless it is fraudulent with respect to the shareholder or constitutes a breach of fiduciary duty owed to the shareholder.

Section 11.65(a)(4) also permits an optional extension of dissenters' rights in additional situations not covered by the statute. Granting such rights may add to the attractiveness of preferred shares and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin a transaction. In situations where the existence of dissenters' rights may otherwise be disputed, the corporation can resolve the question by extending these rights.

The new section provides that when a record holder represents some beneficial owners who want to dissent and some who do riot, the rights of both groups can be honored only by letting the recordholder dissent for some but not for others. Such dichotomy of position was not permitted under the 1933 Act. It is limited to representation of different holders, since it could be abused by a single beneficial owner who is not fundamentally opposed to proposed corporate action but who wants to speculate as to some of the shares on a high payment to dissenters. Permitting beneficial owners to dissent also recognizes that a large fraction of publicly-traded securities are held on behalf of their owners by nominees. It would be foreign to the purposes of these nominees to participate in litigation on behalf of their clients. In order to make dissenters' rights effective without burdening the nominee, beneficial owners must be allowed to assert their own claims. Section 11.65 now authorizes such assertion.

The beneficial owner is required to submit a written assent by the holder of record to his assertion of dissenters' rights. This requirement serves not only to verify the beneficial owner's entitlement, but also it permits the title holder of record to protect any security interest in the shares. In practice, a brokerage customer who receives a forwarded notice of a proposed corporate action and who wishes to dissent may request the broker to supply the name of the holder of record (which may be a house nominee) and a consent signed by the holder. From that stage forward, the corporation will deal with the beneficial owner in the same fashion as a record shareholder.

The 1933 Act as amended in 1981 permitted a corporation organized before July 1, 1971, the effective date of the 1970 Illinois Constitution, to abolish cumulative voting upon unanimous vote of all of the shareholders. The constitutionality of this provision is presently being tested in the Supreme Court of Illinois. See the Introduction to these Comments. Section 8 of the Transition Schedule to the 1970 Constitution seems to ban non-cumulative voting in pre-1971 corporations. The Secretary of State, upon advice of the Attorney General, refused to accept for filing amendments to pre-1971 corporate charters which abolished cumulative voting or created non-voting shares even when adopted by unanimous vote of shareholders. Section 11.65(a)(3)(iii) goes one step further and provides that elimination of cumulative voting in a pre-1982 corporation can give rise to dissenters' rights for dissenting shareholders. The extension of dissenters' rights to this situation along with the reserved powers clause of the statute and Constitution should answer the constitutional objections to pre-1971 corporations abolishing cumulative voting rights.

SECTION 11.70. PROCEDURE TO DISSENT.

Section 11.70 replaces previous §§66a, 70, and 73 dealing with dissenters' rights under the 1933 Act, and seeks to motivate parties to settle their differences in private negotiations without resort to judicial appraisal proceedings. Section 11.70 (a) requires that the notice of meeting of shareholders inform the shareholders of their right to dissent and the procedure to dissent. Notification in advance was not previously required. If the corporation furnishes to the shareholder such material information with respect to the transaction as will objectively enable the shareholder to vote on the transaction and to determine whether or not to exercise dissenters' rights, the shareholder must notify the corporation before the vote is taken that he wishes to dissent and not vote in favor of the proposed action. Thus, the corporation may be able to estimate how much of a cash requirement may be required. A notice also serves to limit the number of persons, to whom the corporation must give further notice.

Section 11.70(b) outlines the procedure for the corporation to deliver notice of the action to shareholders and for the shareholders to assert dissenters' rights when the corporate action is not to be approved at a meeting of shareholders.

Section 11.70 (c) requires the corporation to make its offer first (thereby establishing a minimum price) and permits it to instruct the shareholder to sell his shares if there is a public market. The Advisory Committee felt that the right of a dissenting shareholder to receive payment for his or her shares from the corporation should be limited to situations where there is no readily available public market for the shares.

If a shareholder is instructed to sell his shares and does not do so, the price he could have received in the sale is deducted from whatever recovery he is able to make through exercise of his dissenting shareholder rights.

Under §11.70(b), the dissenter who is not content with the corporation's offer must state in writing the amount he will accept. He cannot by remaining silent force the corporation into the expense and delay of a judicial appraisal. This provision is designed to encourage settlement without a judicial proceeding.

Paragraph (e) provides the procedure for judicial appraisal. In a significant change from the 1933 Act, the corporation, not the shareholder, must file a petition to determine the fair value of the shares. Venue is limited to the circuit court where either the registered office or the principal office of the corporation is located, and all dissenting shareholders who have not settled shall be joined as parties.

Paragraph (f) on jurisdiction of the court appointment of appraisers is adopted without substantial change from §66a(e) of the 1933 Act.

Paragraph (g) is a variation of a similar provision in the existing Model Act. The subject of judgment has been changed from the full value to the difference between the preliminary payment, if one has been made, and the full value, or the proceeds of sale and the full value, if the sale were made pursuant to direction of the corporation. The paragraph requires an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from the date on which the corporate action giving rise to the right to dissenters.' was approved to the date of payment. The fact that the date on which interest starts to run begins with shareholder action rather than consummation of the transaction may create difficulties because the corporation through no fault of its own may be unable to complete the merger for a considerable period of time if it must fight suits from other shareholders or challenges to the transaction first, and the consummation of the transaction is delayed while, such litigation or administrative action ensues. The provision for interest from the date of corporate action was inserted by legislative amendment.

Paragraph (h) is a variation of similar provisions in §66a of the 1933 Act and the existing Model Act and has no counterpart in §§70 and 73 of the 1933 Act. The legislature deleted a provision in the proposed bill which would have permitted the assessment of attorney's fees against the dissenting shareholder if he failed to act in good faith. It also deleted a provision that the court may award to a dissenter's counsel reasonable fees paid out of amounts awarded to dissenters similarly situated who were substantially benefitted if such fees were not assessed against the corporation.

Section 11.70 represents a major departure from the 1933 Act that is more specific. than similar statutes in other states and gives substantial powers to the court in an appraisal proceeding.

SECTION 12.05. VOLUNTARY DISSOLUTION BY INCORPORATORS OR BY INITIAL DIRECTORS.

A majority of the incorporators or a majority of the initial directors may act to dissolve a corporation in the limited circumstances where §12.05 may operate: no shares have been issued; all subscriptions, less necessary expenses, have been returned; no corporate debt remains unpaid; and, if not unanimous, three days notice has been given to the group acting by majority. Dissolution by incorporators or by initial directors, when permitted by §74 of the 1933 Act, could have been effected only by unanimous action and, then, only if the corporation had not commenced business. The requirement that the corporation not have commenced business has been deleted. The change from unanimity to a majority reflects the Advisory Committee's intention that the Illinois statutory structure relating to corporations contain more flexibility. The Advisory Committee believed that the likelihood of harm to any interested person, resulting from such increased flexibility, in this instance, was, at most, remote. Section 74 of the 1933 Act also provided for the content of the articles of dissolution; the required content thereof is now in §12.20.

SECTION 12.10. VOLUNTARY DISSOLUTION BY WRITTEN CONSENT OF ALL SHAREHOLDERS.

Under §75 of the 1933 Act, unanimous action by shareholders could authorize a dissolution, without director action having been a .prerequisite. There is no substantive change other than deletion of the reference to the statement of intent to dissolve. Because the 1983 Act has a one-step dissolution procedure, no statement of intent to dissolve is called for. The required content of the articles of dissolution is now in §12.20.

SECTION 12.15. VOLUNTARY DISSOLUTION BY VOTE OF SHAREHOLDERS.

Under the 1983 Act, the directors may place, the issue of dissolution before the shareholders, with or without a directors' recommendation. The holders of one-fifth of the outstanding shares may propose a dissolution, and, if the directors fail to call a meeting to consider such a proposal within the ensuing year, those shareholders may call such a meeting. While a two-thirds vote is the statutory norm, the articles of incorporation, consistent with other changes effected by the 1983 Act, may specify a smaller or larger vote requirement (but not less than a majority). Under §76 of the 1933 Act, favorable action by the corporation's directors was a prerequisite. Like other changes in the statutory structure now permitted by the 1983 Act, the shareholders can be given greater authority in certain organic corporate actions, such as dissolution, and more flexibility, in permitting a corporate structure that can be dissolved by as little as a majority vote. The provisions of §11.60 are intended to operate in a consistent manner. In addition, where a recommendation of directors could present a conflict of interest, the board, as a whole, may submit the issue of dissolution to the shareholders, without a recommendation. Because the 1983 Act has a one-step dissolution procedure, no statement of intent to dissolve is called for. The required content of the articles of dissolution is now in §12.20. Section 76 of the 1933 Act also provided for the content of a statement of intent to dissolve; no such statement is now called for.

SECTION 12.20. ARTICLES OF DISSOLUTION.

After authorization under §12.05, §12.10 or §12.15 of the 1983 Act, articles of dissolution are filed, and a certificate of dissolution is issued. Under the 1933 Act, a statement of intent to dissolve (§77) followed action under §74, §75 or §76; and, then there was liquidation and winding-up under

§§78-74; then articles of dissolution could be filed (§80). Under the 1983 Act, the liquidation and winding-up process can be completed, without regard to the timing of the filing of the articles or the issuance of the certificate. The one-step process is a simplified statutory structure. The Advisory Committee's perception was that, there would be no less real protection to creditors; creditor protection is believed to be better provided for in §12.75 and §12.80. The new dissolution process contemplates that, notwithstanding the issuance of a certificate of dissolution, a corporation will maintain a registered agent for as much as five years thereafter. With these changes, the long-standing practice of abandoning corporations to formal dissolution by the Office of the Secretary of State may be substantially less prelevant, and affirmative dissolution action may become the norm.

SECTION 12.25. REVOCATION OF DISSOLUTION.

Under §§79a-d of the 1933 Act, in addition to covering revocation in four separate sections, shareholder action was required. This rare action is now to be taken by a simple and concise procedure. Under the 1983 Act, no more than director action is required. With such action, if timely (within 60 days after issuance of the certificate of dissolution), and the issuance of a certificate of revocation of dissolution, all prior dissolution filings and certificates issued are to be deemed a nullity.

SECTION 12.30. EFFECT OF DISSOLUTION.

Under §79 of the 1933 Act the liquidation and winding-up process took place in the interim between the filing of the statement of intent to dissolve and the filing of the articles of dissolution. In the 1983 Act, there is no substantive change, except to permit any part or all of the liquidation and winding-up process to follow, rather than proceed, the filing of the articles of dissolution. During the liquidation and winding-up process, the corporation is to have all corporate power and authority to conduct its affairs and to transfer title to all of its assets. Creditor protection is provided for in §12.75 and §12.80. The provisions for judicial aid in the dissolution process are now in §12.50(d).

SECTION 12.35. GROUNDS FOR ADMINISTRATIVE DISSOLUTION.

Section 82 of the 1933 Act provided the grounds for administrative dissolution by the Office of the Secretary of State. The grounds have been reduced to matters of concern to the Office of the Secretary of State, i.e.: failure to timely file an annual report or to pay franchise tax; failure to file any other required report; failure to maintain a registered agent in Illinois. The Advisory Committee believed that the Office of the Secretary of State should have the administrative power to dissolve a corporation only on grounds of significant concern to it.

SECTION 12.40. PROCEDURE FOR ADMINISTRATIVE DISSOLUTION.

Section 82a of the 1933 Act provided a procedure for administrative dissolution by the Office of the Secretary of State and for reinstatement. There is no substantive change, except to add a requirement that the dissolved corporation do no more than wind up its affairs. The provisions for reinstatement are now in §12.45.

SECTION 12.45. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

Section 82a of the 1933 Act provided a procedure for reinstatement after an administrative dissolution by the office of the Secretary of State. There is no substantive change, except to add a five-year limitation period in 512.45(a) and to provide for the effect of a reinstatement in the same manner as a revocation of a dissolution under 512.25. The Advisory Committee was informed that management of a corporation commonly abandoned it to administrative dissolution by nonpayment of franchise tax liabilities but, later when faced with creditor action or contemplating bankruptcy, management sought reinstatement in order to obtain the limited liability protections of the corporate form. Imposing the five-year limitation was the result.

SECTION 12.50. GROUNDS FOR JUDICIAL DISSOLUTION.

Several sections of the 1933 Act were consolidated into this section, and there is an expansion of the circumstances that can give rise to a judicially supervised dissolution, such as (a) deadlock but no irreparable injury to the corporation and (b) director initiation of an action without shareholder authority in each case, if the business of the corporation can no longer be conducted to the general advantage of its shareholders. The 1982 amendments to §82 of the 1933 Act reduced the circumstances under which the Office of the Attorney General would bring an action to dissolve a corporation to the following: (1) the certificate of incorporation had been obtained through fraud; (2) the corporation had continued to exceed or abuse its authority or violate law, after notice; or (3) an interrogatory of the office of the Secretary of State had been answered falsely or not fully. Section 86 (a) of the 1933 Act also provided for initiation of dissolution action by a shareholder, under the so-called "13-month rule" for deadlock; §86 (b) provided for such action by a creditor; and §86(c) provided for such action by a corporation that had filed a statement of intent to dissolve. Section 82 of the 1933 Act, as amended in 1982, §86(b) and §86 (d) have been incorporated into §12.50(a) of the 1983 Act, without substantive change.

Section 12.50 (b) of the 1983 Act deletes the "13-month rule" of §86(a) and provides a second basis for a shareholder's dissolution action: a finding that the business of the corporation can no longer be conducted to the advantage of its shareholders in addition to the sole prior basis: a finding of irreparable injury to the corporation. The removal of the "13-month rule" was predicated upon the belief that it was an impractical mechanical test.

With respect to complained of director conduct, the grounds have been expanded to include the past and future, as well as the present. With respect to deadlock, the definition has been expanded from even splits to include inability to attain greater than majority voting requirements for director votes. Director action to seek court-supervised dissolution, without shareholder authority, is permitted in the 1983 Act on no more than a showing that the corporation's business can no longer be conducted to the general advantage of its shareholders.

With respect to the latter, the Advisory Committee was informed that the treatment in Federal bankruptcy proceedings of potential, contingent and unliquidated claims is in an unresolved state;

a state of incorporation judicial forum could be a solution to a perceived inability of the existing legal system to provide a forum for resolution of a serious potential corporate disability. The Advisory Committee intended that voluntary dissolution proceedings authorized by a corporation's directors or shareholders be conducted under supervision of a court when deemed necessary by either.

SECTION 12.55. ALTERNATIVE REMEDIES TO JUDICIAL DISSOLUTION.

Section 12.55 is new. If dissolution is sought under §12.50 of the 1983 Act, or if the grounds of §12.50 are alleged, but dissolution is not sought, a court may order certain remedies other than dissolution: the appointment of a provisional director, the appointment of a custodian, or, in an action by a shareholder, purchase of the complaining shareholder's shares. A provisional director or custodian is to report to the appointing court from time to time and is not to be liable for any action or decision in good faith. Since a provisional director or a custodian's powers necessarily interfere with those of the officers and directors of the corporation, any officer or director wishing clarification of his or her role is to petition the appointing court for instructions. Principal sources for the alternative remedies concept were the corporation laws of Delaware and New Jersey and the ABA's proposed 1983 Revised Model Business Corporation Act.

The Advisory Committee perceived a need for remedies less Draconian than dissolution, whenever anyone sought dissolution of a corporation. A provisional director is likely to be appropriate for a case involving deadlock. If deadlock cannot be so resolved, or if the business of the corporation cannot be conducted to the general advantage of its shareholders, appointment of a custodian may be an appropriate remedy. In the limited circumstances of either §12.55(f) or §12.55(g), court-required share purchases of the shares of a complaining shareholder may be appropriate. The phrase "and upon the motion of the complaining shareholder" was added to §12.55(f) in the course of. the legislative process. The Advisory Committee is not aware of the reason why that change was proposed for §12.55(f) but not for §12.55(g). Section 12.55 (f) is to operate only if grounds for dissolution under §12.55 (b) are alleged by the complaining shareholder, and applied only on his or her option, and that shareholder is to look only to the corporation for purchase of his shares under that section. It was not intended that the court be able to require personal commitments of other shareholders unless they were willing to make such commitment in order to have the corporation accomplish the purchase. Section 12.55 (g) is to operate on the initiation of the corporation or any shareholder only once a complaining shareholder has sought dissolution under §12.50(b). The Advisory Committee's intent in §12.55(f) was to authorize certain parties to a dissolution proceeding to seek an order of an equity court, directing a sale of the complaining shareholder's interest in the corporation or, in §12.55 (g) to the corporation or other shareholder(s). The court is expected to do equity and, in doing so, may determine the value of the shares for this purpose. If it makes such a determination, the appraisal procedures for shares of a dissenting shareholder of §11.70 (c) must be followed.

Section 12.55 (h) provides for award of attorneys' fees against any party initiating a §12.50 action arbitrarily, vexatiously or not in good faith.

SECTION 12.60. PRACTICE IN ACTIONS FOR JUDICIAL DISSOLUTION AND FOR

ALTERNATIVE REMEDIES.

Section 84 of the 1933 Act covered venue and process for involuntary dissolution; §85 covered practice in actions for involuntary dissolution; §87 covered procedure in liquidation of a corporation under judicial supervision; §88 provided qualifications of receivers; and §89 provided the procedure for the filing of claim in liquidation proceedings.

Venue of an action under §§12.50 and 12.60 of the 1983 Act is fixed in §12.60 (a) as the court in the county of either the registered office or the principal office of the corporation, without the alternative of the Circuit Court of Sangamon County. Section 12.60 (b) provides the procedures for dissolution actions by the Attorney General, which are most commonly brought for failure of corporations to respond to periodic interrogatories issued in the ordinary course by the Office of the Secretary of State. Section 12.60 (c) provides the discretionary authority to the court to make shareholders parties to judicial dissolution actions. Section 12.60 (d) contains the discretionary authority of the court to appoint an interim receiver, pending a hearing; §12.60 (e) contains the authority to appoint a liquidating receiver or receivers. Section 12.60 (f) grants the authority to any receiver to conduct litigation. Section 12.60 (g) permits any resident individual or any corporation authorized to transact business in Illinois - domestic or foreign - to act as receiver, with bond and surety to be within the court's discretion.

Section 12.60 (h) permits a shifting of roles from a receiver to a custodian, or vice versa, because of the Advisory Committee's perception than a corporation operating under a receivership may be more disadvantaged that a corporation operating under a custodian. Section 12.60(i) limits a receiver's compensation to assets of the corporation or the proceeds thereof, consistent with §12.55(e).

This section consolidates several sections of the 1933 Act, deletes redundancies and adds clarifying language - all without substantive-change, except to accommodate the custodian concept provided for in §12.55.

SECTION 12.65. DECREE OF DISSOLUTION.

Sections 91 and 92 of the 1933 Act provided the procedure for judicial dissolution, from the decree of dissolution through the issuance of a certificate of dissolution. Section 12.65 (a) of the 1983 Act provides procedures for judicial dissolution similar to those of the 1933 Act, except that §12.65(b), because of the new one-step dissolution process, refers simply to §12.30 and §12.75. The goal of these changes was a more logical process, consistent with the one-step dissolution concept. A corporation dissolved by court order may be reinstated pursuant to §12.45, within five years by proper action in the court having jurisdiction.

SECTION 12.70. DEPOSIT OF AMOUNT DUE CERTAIN SHAREHOLDERS.

While the first paragraph of §93 of the 1933 Act provided for delivery of unclaimed property to the Director of Financial Institutions, the second imposed personal liability upon directors or a receiver who failed to dispose properly of assets of a dissolved corporation. In the 1983 Act, the rights of the Director of Financial Institutions were preserved; however, the personal liability provision was deleted, consistent with the deletion of other statutory provisions for personal liability in the 1933 Act. The Advisory Committee believed that personal liability of directors in this area., as well as others similarly deleted, was more properly a subject of traditional actions alleging corporate waste, improper distributions under §9.10, or a receiver`s misconduct.

SECTION 12.75. KNOWN CLAIMS AGAINST DISSOLVED CORPORATIONS.

Under §§79 and 89 of the 1933 Act, after the filing of a statement of intent to dissolve, the corporation followed a notice and claims procedure that had a two-year limitation. ~ Section 12.25 of the 1983 Act provides a similar procedure for known claims, whether or not liquidated. If the corporation follows the procedure set forth in this section, any such claim not timely made is barred. This section was intended to provide an expeditious manner of resolving claims against a dissolved corporation. Use of this' procedure cannot, however, bar claims based upon a contingent liability nor claims arising after the date of dissolution and, of course, does not bar claims of unknown claimants, typical of products or professional liability and toxic torts. The Advisory Committee expects that a corporation taking advantage of this section will accept or reject claims within a reasonably prompt time, prior to completion of the winding-up and distribution process; failure of the corporation to be prompt in accepting or rejecting a claim would not bar that claim until 90 days after the date of the rejection notice.

SECTION 12.80. SURVIVAL OF REMEDY AFTER DISSOLUTION.

Under §94 of the 1933 Act, remedies after dissolution survived for only two years. Under the 1983 Act remedies after dissolution survive for five years. The Advisory Committee believed that, as often occurs in product liability cases, injuries are often not known for a significant period of time, and trends towards both longer statutory remedy survival periods and judicial avoidance of short survival periods exist. The Advisory Committee balanced assured finality and a reasonable discovery period, determining that, in the present state of our legal structure, five years was appropriate. For known claims, even if unliquidated, the notice and claim process of §12.75 is available to any dissolved corporation. If it is subject to substantial known claims, or if it fears substantial claims from unknown claimants, a corporation has judicial dissolution available to it, by use of §12.50(d). Section 12.80 is intended to provide a statute of limitations for unknown claims, contingent claims, and claims arising after the date of dissolution.

SECTION 13.10. POWERS OF FOREIGN CORPORATION.

Section 103 of the 1933-Act provides that a foreign corporation authorized to transact business in Illinois enjoys the same but no greater rights and powers than a domestic corporation. Section 13.10 incorporates the additional limitation of §13.05 that the Illinois Business Corporation Act should not be construed as regulating the organization or internal affairs of foreign corporations. Illinois courts, from time to time, have held applicable to foreign corporations many of the provisions of the 1933 Act which regulate the organization or internal affairs of Illinois corporations. Houck v. Martin, 82 I11. App. 3d 205, 402 NE 2d 430 (4th Dist. 1980) leave to appeal denied; Tasner v. U. S. Industries, Inc., 379 F. Supp. 803 (N.D. I11. 1974); McCormick v. Statler Hotels Delaware Corp., 30 I11. App. 2d 86, 195 NE 2d

172 (1963). The proposed revision is intended to overrule these cases.

Many reasons exist for organizing a business under the corporation laws of states other than Illinois, not the least of which has been a desire to have the organization and internal affairs of the corporation governed by the laws of another state. By holding that the Illinois Business Corporation Act may govern internal affairs of foreign corporations, courts have failed to give full force and effect to the laws of sister states and have failed to recognize the explicit language of Section 102 (now §13.05) of the 1933 Act as well. Shareholders, directors, officers and others should look to the laws of the state of incorporation to protect their interests. The proposed revision recognizes this principle, gives effect to the prior language of §13.05 and the policy therein expressed, and prevents a circumvention of such policy by a contrary interpretation of §103 of the 1933 Act.

SECTION 13.15. APPLICATION FOR CERTIFICATE OF AUTHORITY.

Section 13.15 combines those provisions of §106 and 197 of the 1933 Act which set forth the contents of the application and require the certified copy of articles; deletes execution and filing requirements but adopts the provision of §1.10 as a substitute; and makes conforming changes in terminology. In keeping with the general approach of the 1983 Act, the drafters have consolidated two sections of the 1933 Act to avoid needless duplication and repetition. The substance of the subject matter of these sections has not been altered. Since "stated capital", "paid-in surplus" and "par value" concepts are deleted from the 1983 Act, conforming changes in terminology have been incorporated into §13.15. See also §§1.80(i) (j).

SECTION 13.45. WITHDRAWAL OF FOREIGN CORPORATION.

Section 13.45 eliminates the distinction between an application of a foreign corporation for withdrawal and a final report; adopts execution and filing provisions of §1.10; adds the filing of a certified copy of articles of dissolution as an alternative to withdrawal; and makes conforming changes in terminology. It combines §§120 and 121 of the 1933 Act. The Secretary of State has long accepted a certified copy of articles of dissolution in lieu of a withdrawal application. This section authorizes this practice as a legitimate and useful option available to foreign corporations which may have been dissolved in their home states. For execution and filing, see §1.10. See also §,§1. 80 (i) and (j) .

SECTION 13.50. GROUNDS FOR REVOCATION OF CERTIFICATE OF AUTHORITY.

Section 13.50 combines all grounds for revocation into a single section instead of §122 and 122a of the 1933 Act. The treatment of grounds for revocation parallels that for administrative dissolution. See §12.35.

SECTION 13.55 PROCEDURE FOR REVOCATION OF CERTIFICATE OF AUTHORITY.

Section 13.55 sets forth a clear and orderly procedure for notifying a corporation of a delinquency giving rise to grounds for revocation, for revoking the certificate of authority and issuing a certificate of revocation; includes notice requirements and states the contents of the certificate of revocation; and provides the effect of a revocation of a certificate of authority. This section parallels the sections on administrative dissolution. See §12.40. This section covers several important matters upon which the §123 of the 1933 Act was silent: notice requirements, contents of the certificate of revocation, and the effect of a revocation. The inclusion of provisions dealing specifically with these matters will assure foreign corporations due process safeguards.

SECTION 13.60. REINSTATEMENT FOLLOWING REVOCATION.

Section 13.60 sets forth a procedure by which a foreign corporation may reinstate its certificate of authority after a revocation; limits the right to reinstatement to the five year period following revocation; and states contents of the application and the legal effect of a reinstatement. The 1933 Act contained no provision authorizing reinstatement of foreign corporations after they have had their certificates of authority revoked. This is an inequitable oversight which is remedied in the 1983 Act. The provisions of this section parallel those of a reinstatement following an administrative dissolution of a domestic corporation. See §12.45.

SECTION 13.70. TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY.

The penalty for transacting business in Illinois without a certificate of authority under the 1933 Act was 10% of all fees and taxes owed under the 1933 Act. Section 13.70 changes the penalty to $200 plus $5 a month for each month business was transacted. In practice, the 1933 Act penalty provision resulted in a minimal penalty of $10 - $25. This is hardly a penalty which would deter, a corporation from ignoring provisions of the Business Corporation Act. Most states fix their penalty in terms of a fixed or maximum dollar amount, ranging from $200 to $1,000. The 1983 Act is intended to bring Illinois in line with the majority of states and to encourage compliance with the certificate of authority sections of the Act before the foreign corporation begins business in this State.

See also §4.25 which for the first time permits a foreign corporation to register its corporate name in the State of Illinois.

SECTION 14.05. ANNUAL REPORT OF DOMESTIC OR FOREIGN CORPORATION.

Section 14.05 combines the annual report requirements for domestic and foreign corporations formerly contained in §95 and §115 of the 1933 Act into a single section and makes conforming changes in terminology. It provides a uniform treatment of domestic and foreign corporations and facilitates simplification.

For terminology changes, see §§1.80(i) and (j).

SECTION 14.10. FILING OF ANNUAL REPORT OF DOMESTIC OR FOREIGN CORPORATION.

Section 14.10 combines the requirements of §§96 and 116 of the 1933 Act into a single section and describes when annual reports are due.

SECTION 14.20. REPORTS OF ISSUANCE OF SHARES AND INCREASES IN PAID-IN CAPITAL.

Section 14.20 combines the reports required by Sections 97 and 117 of the 1933 Act into a single section; adopts the execution and filing provisions of 51.10; deletes §§98 and 118 of the 1933 Act and makes conforming changes in terminology. See §§14.05, 1.10.

SECTION 14.25. REPORT OF CHANGES IN PAID-IN CAPITAL IN CERTAIN CASES.

The 1933 Act required that a report be filed with the Secretary of State within 60 days after a cancellation of shares, after a reduction of stated capital or paid-in surplus, or after a merger; it contained separate sections for domestic and foreign corporations. (§§58a, 59, 60a, 99 and 119). Section 14.25 combines the report requirements of the 1933 Act; makes conforming changes in terminology; and adopts provisions of 51.10. See §§1.80(i) & (j), 1.10, 14.05, 9.15, 9.05.

SECTION 15.05. FEES, FRANCHISE TAXES AND CHARGES TO BE COLLECTED BY SECRETARY OF STATE.

This section and article follow the provisions of the 1933 Act in requiring payments for various reports and filings with the Secretary of State, and the amounts of the payments are unchanged.

SECTION 15.10. FEES FOR FILING DOCUMENTS AND ISSUING CERTIFICATES.

The 1983 Act eliminates some reports and adds others. Section 15.10 reflects appropriate changes in filing fees for such reports. Paragraph (d), the fee for filing intent to dissolve, has been deleted, since the 1983 Act will not require a statement of intent. The new paragraph (d) sets forth the fee for filing articles of share exchange under §11.25. The fee is the same as for mergers. Paragraph (n) includes a fee for certified copies of articles of dissolution of a foreign corporation required under §13.145. Paragraph (r) reflects the changes in the remittance paid for assumed corporate names, §4.15. Paragraph (s) reflects the addition of a report to declare a change or cancellation of an assumed corporate name under section 4.20. Paragraph (t) sets forth the filing fee and renewal fee for registration of a name of a foreign corporation under §12.25.

SECTION 15.15. MISCELLANEOUS CHARGES.

Section 15.15 retains the fee for furnishing a copy or certified copy of any document, instrument or paper relating to a corporation at $.50 per page, but provides for a minimum of not less than $5.00 plus $5.00 for the certificate and for affixing the seal thereto. This is an administrative provision necessitated by the increasing volume of copy requests received by the Secretary of State

SECTION 15.20. LICENSE FEES PAYABLE BY DOMESTIC CORPORATIONS.

The license fees are unchanged. There's a change in terminology to "paid-in capital" in lieu of "stated capital" and "paid-in surplus".

SECTION 15.25. BASIS OF COMPUTATION OF LICENSE FEES PAYABLE BY DOMESTIC CORPORATIONS.

This section does not change in substance §129 of the 1933 Act despite conforming terminology chances.

SECTION 15.30. RATE OF LICENSE FEES PAYABLE BY DOMESTIC CORPORATIONS.

The 1933 Act provided for a minimum license fee of $.50 based upon a rate of 1/20 of 1% of minimum total stated capital and paid-in surplus of $1,000.00. Due to elimination of S§47.14 and 40 of the 1933 Act, it is necessary to set a minimum license fee of $.50 in this section.

SECTION 15.35. FRANCHISE TAXES PAYABLE BY DOMESTIC CORPORATIONS.

This section restates §131 of the 1933 Act and makes changes in terminology only.

SECTION 15.40. BASIS FOR COMPUTATION OF FRANCHISE TAXES PAYABLE BY DOMESTIC CORPORATIONS.

See comment under §15.35.

SECTION 15.45. RATE OF FRANCHISE TAX PAYABLE BY DOMESTIC CORPORATIONS.

See comment under §15.35.

SECTION 15.50. LICENSE FEES PAYABLE BY FOREIGN CORPORATIONS.

See comment under §15.35.

SECTION 15.55. BASIS OF COMPUTATION OF LICENSE FEE PAYABLE BY FOREIGN CORPORATION.

See comment under §15.35.

SECTION 15.60. RATE OF LICENSE FEES PAYABLE BY FOREIGN CORPORATIONS.

See comment under §15.30.

SECTION 15.65. FRANCHISE TAXES PAYABLE BY FOREIGN CORPORATIONS.

See comment under §15.35.

SECTION 15.70. BASIS FOR COMPUTATION OF FRANCHISE TAXES PAYABLE BY FOREIGN CORPORATIONS.

See comment under §15.35.

SECTION 15.75. RATE OF FRANCHISE TAXES PAYABLE FOR FOREIGN CORPORATIONS.

See comment under §15.35.

SECTION 15.80. ASSESSMENT AND COLLECTION OF ANNUAL FRANCHISE TAXES - PROCEEDING FOR DISSOLUTION OR REVOCATION IF NOT PAID.

This comment makes §143 of the 1933 Act applicable to foreign corporations as well as domestic corporation.

SECTION 15.85. EFFECT ON NONPAYMENT OF FEES AND FRANCHISE TAXES.

Section 142 of the 1933 Act provided that the Secretary of State shall not file reports for any corporation so long as fees or taxes are owed. Section 15.84 of the 1983 Act adds a clause to cover filing of reports with a delayed effective date. The additional clause is necessitated by a revision which permits an amendment or merger to become effective within 30 days after the date of filing with the Secretary of State. With a delayed effective date, it is possible that fees will be owed on the effective date that are not owed on the date of filing.

SECTION 16.05 PENALTIES IMPOSED UPON CORPORATIONS.

The provision of §100 of the 1933 Act have been carried over intact in §1605, except that the period for corporations to pay a prescribed fee for assumed corporate name renewal when due is extended to 90 days rather than 60 after notice is mailed.

SECTION 16.10. PENALTIES IMPOSED UPON OFFICERS AND DIRECTORS.

This section is unchanged from §101 of the 1933 Act.

SECTION 17.05. REPEALER.

This section provides that the 1933 Act is repealed in its entirety on July 1, 1984, the effective date of the 1983 Act.