

# Chapter 53

## Corporations

### Article 1

#### State Corporation Commission

#### **§ 53-1-1. Repealed.**

Repeals. - Laws 1978, ch. 132, § 6, repeals 51-1-1, 1953 Comp. (former 53-1-1 NMSA 1978), relating to bonds of members of the state corporation commission, effective March 6, 1978.

#### **§ 53-1-2. [Chief clerks and department heads; bonds; amount; character.]**

The chief clerk, assistant chief clerk, chief of the rate department and the chief or head of each and every department created or conducted by said commission, shall each be required to execute in favor of the state a bond in the sum of two thousand five hundred dollars [(\$2,500)], of like character, with like surety or sureties and for like purposes, to be approved by and filed with the respective state officers, as prescribed by the preceding section [53-1-1 NMSA 1978].

History: Laws 1913, ch. 68, § 2; Code 1915, § 5369; C.S. 1929, § 134-1102; 1941 Comp., § 54-102; 1953 Comp., § 51-1-2.

Cross-references. - For creation, organization, duties, powers, and procedures of state corporation commission, see N.M. Const., art. XI, § 1 et seq. For Surety Bond Act, see 10-2-13 NMSA 1978 et seq.

Compiler's notes. - Section 53-1-1 NMSA 1978, the "preceding section" referred to in this section, was repealed by Laws 1978, ch. 132, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees §§ 491, 499, 500.

Invalidity of designation of officer, fiduciary or depository as affecting liability on bond, 18 A.L.R. 274.

Duties: liability on bond of public official or employee as affected by change in principal's duties, 94 A.L.R. 613; 140 A.L.R. 1280.

Statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A.L.R. 501.

Time: constitutional, statutory, or charter provision as to time of taking oath of office and giving official bond as mandatory or directory, 158 A.L.R. 639.

Malfeasance in office, public officer's bond as subject to forfeiture for, 4 A.L.R.2d 1348.  
67 C.J.S. Officers § 47.

### **§ 53-1-3. [Payment of bond premiums.]**

If any such bond be tendered, with a surety company as surety, the premium upon such bond shall be paid out of funds appropriated for the contingent expenses of the state corporation commission.

History: Laws 1913, ch. 68, § 3; Code 1915, § 5370; C.S. 1929, § 134-1103; 1941 Comp., § 54-103; 1953 Comp., § 51-1-3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees § 504.

Premium: right or duty of municipality, county, or other public body to pay premium on bond given by officer, 66 A.L.R. 795.

67 C.J.S. Officers §§ 230 to 235.

### **§ 53-1-4. [Rate clerk; residence qualification waived.]**

The two years' residence qualification for the holding of public office in the state shall not apply to the rate clerk who may be employed by said commission.

History: Laws 1912, ch. 83, § 18; Code 1915, § 5371; C.S. 1929, § 134-1104; 1941 Comp., § 54-104; 1953 Comp., § 51-1-4.

Cross-references. - For affidavit as to residence, see 10-1-6 NMSA 1978.

Compiler's notes. - This section is from the General Appropriation Act of 1912. The two years' residence for public employees was provided for by Laws 1909, ch. 127, § 11 (3950, 1915 Comp.; 96-101, 1929 C.S.). That section has been superseded by Laws 1933, ch. 68, § 1 (10-1-6 NMSA 1978) which provides that persons employed must have been residents for at least one year.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees §§ 60 to 62.

67 C.J.S. Officers § 26.

### **§ 53-1-5. [Receipts of corporation commission paid into state salary fund.]**

All receipts of the state corporation commission, including all receipts of the insurance department of the state, shall hereafter be covered into the state salary fund.

History: Laws 1913, ch. 83, § 11; Code 1915, § 5372; C.S. 1929, § 134-1105; 1941 Comp., § 54-105; 1953 Comp., § 51-1-5.

Cross-references. - For state corporation commission administrative fund, see 53-1-6 NMSA 1978. For fees of corporation commission, see 53-2-1 NMSA 1978. For creation, organization, duties, powers, and procedures of state corporation commission, see N.M. Const., art. XI, § 1 et seq.

Compiler's notes. - The provision in this section providing for disposition of the receipts of the insurance department was superseded by 58-5-2, 1953 Comp., but that section was repealed by Laws 1955, ch. 221, § 30.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Funds §§ 40, 45, 53, 61.

**§ 53-1-6. State corporation commission salary and contingent funds; transfer of balances in salary and contingent funds to such funds; disbursements to defray state corporation commission operating expenses; disposition of unused amounts in funds at the end of the fiscal year.**

On the effective date of this act, the state treasurer shall transfer into a fund to be known as the "state corporation commission administrative fund" all balances on hand in the following salary and contingent funds; aviation department, corporation department, motor transportation department, franchise tax department, pipeline department and rate department. All monies which are, in the future, allocated or appropriated to the various departments named in this act of the state corporation commission for salary and contingent purposes by the laws creating such departments, shall be transferred to said "state corporation commission administrative fund."

From the state corporation commission administrative fund, the state corporation commission shall disburse such sums as are necessary to defray the expenses of administering the business of the state corporation commission, including all of the departments within its jurisdiction. Such disbursements shall be made upon voucher signed by the chairman of the state corporation commission.

At the end of such fiscal year after the effective date of this act, the state treasurer shall transfer any amount remaining in the state corporation commission administrative fund to the state general fund.

History: 1941 Comp., § 54-106, enacted by Laws 1951, ch. 93, § 1; 1953 Comp., § 51-1-6.

Cross-references. - For provision regarding receipts of corporation commission, see 53-1-5 NMSA 1978. For creation, organization, duties, powers, and procedures of state corporation commission, see N.M. Const., art. XI, § 1 et seq.

Effective dates. - Laws 1951, ch. 93, § 2, makes the act effective on July 1, 1951.

Appropriations. - Laws 1983, ch. 67, § 1, authorizes the state board of finance to issue and sell severance tax bonds in an amount not exceeding \$950,000, when the state corporation commission certifies the need for the issuance of the bonds, and appropriates the proceeds from the sale of the bonds to the state corporation commission for the purpose of purchasing a replacement airplane.

Laws 1983, ch. 67, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - Laws 1951, ch. 93, § 3, repeals all acts or parts of acts in conflict with this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Funds § 5.

## **Article 2**

### **Fees and Miscellaneous Corporation Law**

#### **§ 53-2-1. Fees of state corporation commission.**

A. For filing documents and issuing certificates, the state corporation commission shall charge and collect for:

(1) filing articles of incorporation and issuing a certificate of incorporation, a fee of one dollar (\$1.00) for each ten thousand shares of the total amount of authorized shares, but in no case less than fifty dollars (\$50.00) nor more than five thousand dollars (\$5,000);

(2) filing articles of amendment and issuing a certificate of amendment increasing the total amount of authorized shares, or filing restated articles of incorporation and issuing a restated certificate of incorporation increasing the total amount of authorized shares, a fee equal to the difference between the fee computed at the rate set forth in Paragraph (1) of this subsection upon the total amount of authorized shares including the proposed increase and the fee computed at the rate set forth in Paragraph (1) of this subsection upon the total amount of authorized shares excluding the proposed increase, but in no case less than fifty dollars (\$50.00) nor more than five thousand dollars (\$5,000);

(3) filing articles of amendment and issuing a certificate of amendment not involving an increase in the total amount of authorized shares or filing restated articles of incorporation and issuing a restated certificate of incorporation not involving an increase in the total amount of authorized shares, a fee of fifty dollars (\$50.00);

(4) filing articles of merger, consolidation or exchange and issuing a certificate of merger or consolidation or exchange, a fee equal to the difference between the fee computed at the rate set forth in Paragraph (1) of this subsection upon the total amount of authorized shares in the articles of merger or consolidation in excess of the total amount of authorized shares of the corporations merged or consolidated, or upon the amount of the shares exchanged, but in no case less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000);

(5) filing an application to reserve a corporate name or filing a notice of transfer of a reserved corporate name, a fee of ten dollars (\$10.00);

(6) filing a statement of a change of address of the registered office or change of the registered agent, or both, a fee of ten dollars (\$10.00);

(7) filing a statement of the establishment of a series of shares, a fee of twenty-five dollars (\$25.00);

(8) filing a statement of reduction of authorized shares, a fee of twenty-five dollars (\$25.00);

(9) filing a statement of intent to dissolve, a statement of revocation of voluntary dissolution proceedings or articles of dissolution, a fee of twenty-five dollars (\$25.00);

(10) filing an application of a foreign corporation for an amended certificate of authority to transact business in this state and issuing an amended certificate of authority, a fee of twenty-five dollars (\$25.00);

(11) filing a copy of articles of merger of a foreign corporation holding a certificate of authority to transact business in this state not increasing the total amount of authorized shares, a fee of twenty-five dollars (\$25.00);

(12) filing:

(a) an application for a certificate of authority of a foreign corporation and issuing to it a certificate of authority; or

(b) articles of merger or consolidation increasing the total amount of authorized shares which the surviving or new corporation is authorized to issue in excess of the aggregate number of shares which the merging or consolidating domestic and foreign corporations authorized to transact business in this state had authority to issue, a fee of one dollar (\$1.00) for each one thousand shares of the total amount of authorized shares which is

represented in this state but in no case less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000). The fees payable on an increase in the total amount of authorized shares shall be imposed only on the increased number of shares represented in this state, and the total amount of authorized shares previously authorized which was represented in this state shall be taken into account in determining the rate applicable to the increased amount of authorized shares. The number of authorized shares of a corporation represented in this state shall be that proportion of its total amount of authorized shares, which the sum of the value of its property located in this state and the gross amount of business transacted by it or from places of business in this state bears to the sum of the value of all of its property, wherever located, and the gross amount of its business, wherever transacted. Such proportion shall be determined from information contained in the application for a certificate of authority to transact business in this state until the filing of a corporate report and thereafter from information contained in the latest corporate report filed by the corporation;

(13) filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal, a fee of twenty-five dollars (\$25.00);

(14) filing a corporate report and filing a supplemental report, a fee of twenty dollars (\$20.00);

(15) filing any other statement or report of a domestic or foreign corporation, a fee of ten dollars (\$10.00); and

(16) issuing a certificate of good standing and compliance, a fee of twenty-five dollars (\$25.00).

B. The state corporation commission shall also charge and collect for certifying copies of any document, instrument or paper relating to a corporation, a fee of one dollar (\$1.00) per page, but in no case less than ten dollars (\$10.00). In addition, a fee of one dollar (\$1.00) per page shall be paid in each instance where the commission provides the copies of the document to be certified.

C. As used in this section, "total amount of authorized shares" means all shares of stock the corporation is authorized to issue.

D. The state corporation commission shall also charge and collect fees, according to a fee schedule approved by the department of finance and administration, for the provision of services requested by persons, agencies and entities dealing with the commission.

History: 1953 Comp., § 51-12-1, enacted by Laws 1975, ch. 65, § 1; 1977, ch. 103, § 1; 1983, ch. 304, § 1; 1988, ch. 93, § 1.

Cross-references. - As to rural electric cooperatives, see 62-15-19 and 62-15-27 NMSA 1978. As to conservancy districts, see 73-14-16 NMSA 1978. For fees charged agricultural marketing associations, see 76-12-8 and 76-12-20 NMSA 1978.

The 1983 amendment substituted "authorized shares" for "capital stock authorized" throughout the section, redesignated former Paragraphs (9) through (11), (13) through (16), and (18) and (19) of Subsection A as present Paragraphs (8) through (16) of Subsection A, added Paragraph (17) of Subsection A, deleted former Paragraph (8) of Subsection A, which read: "filing a statement of cancellation of shares, a fee of twenty-five dollars (\$25.00):", deleted former Paragraph (12) of Subsection A, which read: "filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to transact business in this state not increasing the total amount of capital stock authorized, a fee of twenty-five dollars (\$25.00);", redesignated former Subparagraph (c) of former Paragraph (14) of Subsection A as present Subparagraph (b) of present Paragraph (12) and deleted former Subparagraph (b) of former Paragraph (14), which read: "articles of amendment of a foreign corporation increasing the total amount of capital stock authorized;", deleted former Paragraph (17), which read: "filing articles of incorporation of any religious or charitable association or society or other corporation having no capital stock and not authorized for pecuniary profit and issuing to it a certificate of incorporation, a fee of ten dollars (\$10.00)"; in Paragraph (1) of Subsection A, substituted "ten thousand shares" for "one thousand dollars (\$1,000)" and added "nor more than five thousand dollars (\$5,000)," substituted "nor" for "or" near the end of Paragraph (2), inserted "or exchange" following "consolidation" in two places, inserted "or upon the amount of the shares exchanged" and added "nor more than five thousand dollars (\$5,000)" in Paragraph (4), substituted "shares" for "dollars (\$1,000)" following "one thousand" in the first sentence of Subparagraph (b) of Paragraph (12), substituted "corporate" for "annual" in two places in the last sentence of Subparagraph (b) of Paragraph (12), deleted "annual" following "corporate", substituted "a supplemental report" for "supplemental corporate annual reports," and substituted "twenty dollars (\$20.00)" for "ten dollars (\$10.00)" in Paragraph (14), substituted "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in Paragraph (16); substituted "one dollar (\$1.00)" for "seventy-five cents (\$.75)" in the first sentence of Subsection B, deleted "the aggregate par value, expressed in dollars, of" following "means" in Subsection C, deleted the former last sentence of Subsection C, which read: "For the purposes of this subsection, shares without par value shall be deemed to have a par value of one dollar (\$1.00) per share," and added Subsection D.

The 1988 amendment, effective May 18, 1988, deleted former Subsection A(17) which read "reviewing documents and reports to be delivered to the commission, and indicating approval thereof before delivery to the commission, a fee of one hundred dollars (\$100.00)."

Repeals and reenactments. - Laws 1975, ch. 65, § 1, repealed former 51-12-1, 1953 Comp., relating to fees of corporation commission, and enacted a new 51-12-1, 1953 Comp.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Fees are in nature of franchise tax. - The fees payable to the corporation commission are in the nature of a franchise tax for the privilege of operating as a corporation. 1941-42 Op. Att'y Gen. No. 3901.

Entrance fee for foreign corporation. - The entrance fee exacted by a state from a foreign corporation for a license to carry on local business is not a tax but compensation for a privilege, and the validity of the charge is not dependent upon the method by which the amount is determined. *Atlantic Ref. Co. v. Virginia*, 302 U.S. 22, 58 S. Ct. 75, 82 L. Ed. 24 (1937).

Method for setting such fee constitutional. - It is not an unconstitutional burden upon interstate commerce that a state statute makes the authorized capital stock of a foreign corporation seeking to do intrastate business the measure of the fee to be paid as a condition to admission to the state. *Atlantic Ref. Co. v. Virginia*, 302 U.S. 22, 58 S. Ct. 75, 82 L. Ed. 24 (1937).

Fee proper whenever differential between prior authorized and new stock. - The corporation commission would be complying with the statute by charging filing fees upon the differential amount between the prior authorized capital stock and the new capital stock, regardless of the fact whether or not the increased authorized stock would take the corporation into a new bracket in computing the fee. 1953-54 Op. Att'y Gen. No. 5667-A (rendered under former law).

Amendment changing no par stock to par. - Where a foreign corporation had paid an admission fee to the state corporation commission upon filing its articles of incorporation, and now has filed an amendment changing its no par value common stock to that of par value and in connection therewith increasing the number of shares of common stock, it is not entitled to file the amendment without payment of any fee. 1953-54 Op. Att'y Gen. No. 6064 (rendered under former law).

Law reviews. - For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 *Nat. Resources J.* 617 (1966).

For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 *N.M.L. Rev.* 57 (1975).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 *Nat. Resources J.* 415 (1976).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 *N.M.L. Rev.* 371 (1984).

## **§ 53-2-2. Authority to make refunds.**

In response to a written claim for a refund for overpayment of a fee collected by the commission pursuant to Section 53-2-1 NMSA 1978, the commission or its delegate may authorize the refund to a corporation, a foreign corporation or a person of any amount determined by the commission or its delegate to have been erroneously paid to the commission.

History: 1953 Comp., § 51-12-1.1, enacted by Laws 1977, ch. 103, § 2.

## **§ 53-2-3. [Disposition of fees; procedure upon receiving worthless check or draft.]**

The state corporation commission shall turn over to the state treasurer the fees collected under the provisions of this article in the manner required by law; provided, that the state corporation commission shall not be held responsible for any fraudulent or worthless check, draft, warrant, or order, accepted by it in good faith for the payment of any fee or on behalf of any corporation, but shall be permitted to deduct such fee or fees from moneys in its hands to be covered into the state treasury. If such fraudulent or worthless check, draft, warrant or order is not made [made] good forthwith it shall be and is hereby made the duty of the attorney general, as soon as the facts are made known to him, to institute suit against the corporation and its incorporators or directors in the name of the state for the recovery of the amount of such check, draft, warrant or order, and the protest fees and costs of said actions shall be assessed against the defendant or defendants, as the [case] may be.

History: Laws 1905, ch. 79, § 120; Code 1915, § 1004; Laws 1917, ch. 112, § 8; C.S. 1929, § 32-224; 1941 Comp., § 54-1002; 1953 Comp., § 51-12-2.

Cross-references. - As to further disposition of commission fees, see 53-1-5 and 53-1-6 NMSA 1978.

Compiler's notes. - The bracketed word "case" was inserted by the secretary of state in Laws 1917, ch. 112, § 8.

Meaning of "this article". - The words "this article" were substituted for the words "this act" by the 1915 Code compilers and refer to 1915 Code, ch. 23, art. 1, compiled herein as 38-1-5, 38-1-6, 39-4-11, 39-4-12, 53-2-3 to 53-2-5, 53-2-7 and 53-2-8 NMSA 1978.

### **§ 53-2-3.1. Fees of state corporation commission; dishonored check; civil penalty.**

In addition to any penalties, fees or costs under Section 53-2-3 NMSA 1978, any person who pays a fee, tax, penalty or interest by check to the state corporation commission, and which check is dishonored upon presentation, is liable to the commission for such fee, tax, penalty or interest together with a civil penalty of ten dollars (\$10.00) for each such check.

History: 1978 Comp., § 53-2-3.1, enacted by Laws 1979, ch. 179, § 1.

#### **§ 53-2-4. Corporations; compilation.**

The state corporation commission shall annually compile from the records of its office a complete list, in alphabetical order, of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of the authorized capital stock, the amount with which business is to be commenced, the date of filing the certificate and the period for which the corporation is to continue.

History: Laws 1905, ch. 79, § 123; Code 1915, § 1007; C.S. 1929, § 32-227; 1941 Comp., § 54-1004; 1953 Comp., § 51-12-4; Laws 1983, ch. 304, § 2.

The 1983 amendment added the catchline and deleted "and published" preceding "a complete list" near the beginning of the section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations § 895.

#### **§ 53-2-5. [Mutual associations; creation of capital stock.]**

The members of any mutual association, heretofore or hereafter incorporated, may provide for and create a capital stock of such corporation, upon the consent in writing of all the members of the corporation, and may provide for the payment of such stock, and fix and prescribe the rights and privileges of the stockholders therein.

History: Laws 1905, ch. 79, § 122; Code 1915, § 1006; C.S. 1929, § 32-226; 1941 Comp., § 54-1005; 1953 Comp., § 51-12-5.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 431 to 434, 484.

Effect of charter provisions, 15 A.L.R. 1232.

18 C.J.S. Corporations § 201.

## **§ 53-2-6. [Life insurance on directors, officers, agents and employees; evidence of authority for corporate action.]**

Whenever a corporation, organized under the laws of this state, has heretofore caused or shall hereafter cause to be insured the life of any director, officer, agent or employee, and whenever such corporation is named as a beneficiary in or assignee of any policy of life insurance, due authority to effect, assign, release, relinquish, convert, surrender, change the beneficiary, or to take any other or different action with reference to such insurance, shall be sufficiently evidenced to the insurance company by a written statement to that effect, signed by the president and the secretary or other corresponding officer of such corporation, under its corporate seal. Such statement shall be binding upon such corporation and shall protect the insurance company concerned in any act done or suffered by it upon the faith thereof without further inquiry into the validity of the corporate authority or the regularity of the corporate proceedings.

No person shall be disqualified, by reason of interest in the subject matter, from acting as a director or as a member of the executive committee of such corporation on any corporate act touching such insurance.

History: Laws 1927, ch. 33, § 1; C.S. 1929, § 32-1101; 1941 Comp., § 54-217; 1953 Comp., § 51-2-17; recompiled as 1953 Comp., § 51-12-9 by Laws 1967, ch. 87, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 2121.  
19 C.J.S. Corporations § 1122.

## **§ 53-2-7. Amendments by corporations formed under other acts.**

Any corporation organized under any general or special act of the territory or state of New Mexico, including railroad, telegraph and express companies, building and loan associations, banks and savings banks, trust companies, land and irrigation companies and other corporations possessing the right to take and condemn lands, may increase or decrease its capital stock, change its name, the par value of the shares of its capital stock or the location of its principal office in or out of this state, extend its corporate existence and fix any method of altering its by-laws [bylaws] permitted by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. Any corporation organized under Laws 1878, Chapter 1 [63-1-1 to 63-1-8 NMSA 1978], may extend its corporate existence in the manner prescribed in the Business Corporation Act. Any corporation except a corporation exercising the right of eminent domain may, in the same manner, relinquish one or more branches of its business to such branches as might have been inserted in its original certificate of incorporation; provided, however, that original articles of incorporation of railroad corporations, and articles of incorporation and consolidation of railroad corporations incorporated or consolidated under the laws of the territory or state of New Mexico, or under the laws of the territory or state and any other state or states, or any such articles which may have heretofore been amended, may be

amended or further amended by providing that the term of corporate existence of the corporation shall be perpetual.

History: Laws 1905, ch. 79, § 31; Code 1915, § 915; Laws 1915, ch. 76, § 1; C.S. 1929, § 32-132; Laws 1937, ch. 84, § 1; 1941 Comp., § 54-221; Laws 1947, ch. 29, § 1; 1953 Comp., § 51-2-21; recompiled as 1953 Comp., § 51-12-10 by Laws 1967, ch. 87, § 5.

Filing with county clerks. - No requirement exists in this provision for filing or recording articles of incorporation, or amendments, with the county clerks. 1968 Op. Att'y Gen. No. 68-108.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 79 to 95. 18 C.J.S. Corporations § 188.

### **§ 53-2-8. No stockholder's liability; separate class of corporation.**

No stockholder's liability for unpaid stock shall attach to any stock issued by any corporation under the terms of this section if, at the time of filing the certificate, a separate certificate is signed and executed in the same manner that the certificate of incorporation is filed, declaring that there shall be no stockholder's liability on account of any stock issued, and is filed in the office of the state corporation commission together with the certificate of incorporation, and likewise certified and recorded in the office of the county clerk, and the certificate of incorporation, together with the declaration of nonliability of stockholders, is published as provided in this section. This section does not apply to any of the provisions for the issuance of stock and fixing liability and the means of enforcing liability upon the same contained in any other law, but is a separate provision creating a separate class of corporations. Each corporation taking advantage of the provisions of this section must add to its corporate name in the certificate of incorporation, in every other certificate, report or record required by law, and in every contract or other corporate instrument, the words "no stockholder's liability." No corporation shall be organized under this section after December 31, 1967.

History: Laws 1905, ch. 79, § 23; Code 1915, § 907; Laws 1917, ch. 112, § 4; C.S. 1929, § 32-124; 1941 Comp., § 54-309; 1953 Comp., § 51-3-9; recompiled as 1953 Comp., § 51-12-11 by Laws 1967, ch. 87, § 6.

Cross-references. - For general provision regarding liability of subscribers and shareholders, see 53-11-25 NMSA 1978. As to filing of articles of incorporation, see 53-12-3 NMSA 1978.

A corporation may file amended articles of incorporation, accompanied by the certificate of stockholders of nonliability. 1921-22 Op. Att'y Gen. 187.

Building and loan associations. - The certificate of nonliability provided for by this section cannot be extended to building and loan associations. 1912-13 Op. Att'y Gen. 38.

Stockholder's liability. - Under this section, a liability rests upon the stockholders for another sum equal to the amount so certified to have been paid in. 1915-16 Op. Att'y Gen. 167 (rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 42, 45; 18A Am. Jur. 2d Corporations §§ 186 to 188, 196, 197, 249 to 257, 736.

Failure to enter transfer of stock on books of corporation as affecting liability of heirs, 60 A.L.R. 120.

Discharge from liability by surrender of stock, 66 A.L.R. 436.

Stockholder's liability after cancellation of charter, 71 A.L.R. 103; 90 A.L.R. 1350.

Extension of time on corporate debt, stockholder's liability as affected by, 97 A.L.R. 641.

Irregularities in organization of corporation as affecting liability of stockholders, 102 A.L.R. 327.

Enforceability in another jurisdiction of personal liability of stockholders for debts of corporation whose organization is incomplete or defective, 42 A.L.R.2d 659.

Liability of director or dominant shareholder for enforcing debt legally owed him by corporation, 56 A.L.R.3d 212.

19 C.J.S. Corporations § 1761.

## **§ 53-2-9. Validation of unsealed instruments.**

All instruments executed prior to the effective date of this section by a corporation are confirmed and validated notwithstanding the lack of a seal required by law. These instruments have the same effect as if they were properly sealed at the time of execution, and any records of copies shall be received in evidence the same as properly sealed originals.

History: 1953 Comp., § 51-12-12, enacted by Laws 1967, ch. 87, § 7.

Effective dates. - Laws 1967, ch. 87, § 10, makes the act effective on January 1, 1968.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 300 to 304.

18 C.J.S. Corporations § 175.

## **Article 3**

### **Franchise Tax**

Sec.

53-3-1 to 53-3-6. Recompiled.

53-3-7. Repealed.  
53-3-8. Recompiled.  
53-3-9 to 53-3-33. Repealed.

53-3-34. Limitation of actions.

§§ 53-3-1 to 53-3-6. Recompiled.

Recompilations. - Laws 1978, ch. 139, § 23, recompiles 51-13-1, 51-13-2, 51-13-2.1, 51-13-2.2, 51-13-6 and 51-13-7, 1953 Comp. (51-13-1 to 51-13-6 NMSA 1978), relating to the franchise tax, as 51-13-14, 51-13-16, 51-13-20, 51-13-17, 51-13-18 and 51-13-19, 1953 Comp. (53-3-12, 53-3-13, 53-3-17, 53-3-14, 53-3-15 and 53-3-16 NMSA 1978), respectively, effective January 1, 1979.

### **§ 53-3-7. Repealed.**

Repeals. - Laws 1978, ch. 139, § 24, repeals 51-13-8, 1953 Comp. (53-3-7 NMSA 1978), relating to review of assessments, effective January 1, 1979.

### **§ 53-3-8. Recompiled.**

Recompilations. - Laws 1978, ch. 139, § 23, recompiles 51-13-10, 1953 Comp. (53-3-8 NMSA 1978), relating to additional data, as 51-13-22, 1953 Comp. (53-3-19 NMSA 1978), effective January 1, 1979.

§§ 53-3-9, 53-3-10. Repealed.

Repeals. - Laws 1978, ch. 139, § 24, repeals 51-13-12, 1953 Comp. (53-3-9 NMSA 1978), relating to disposition of amounts collected, and 51-13-12.1, 1953 Comp. (53-3-10 NMSA 1978), relating to refunds, effective January 1, 1979.

§§ 53-3-11 to 53-3-17. Repealed.

Repeals. - Laws 1986, ch. 20, § 136D repeals former 53-3-11 through 53-3-17 NMSA 1978, relating to the Franchise Tax Act, effective May 21, 1986. For provisions of former sections, see 1983 Replacement Pamphlet. For present provisions, see Article 2A of ch. 7 NMSA 1978.

Temporary provisions. - Laws 1986, ch. 20, § 133 provides that all liabilities and reporting requirements of corporations pursuant to the Franchise Tax Act shall remain in effect for taxable years ending before December 31, 1986, and shall be the responsibility of the state corporation commission to be administered pursuant to the provisions of the Franchise Tax Act in effect on January 1, 1986.

### **§ 53-3-18. Repealed.**

Repeals. - Laws 1979, ch. 390, § 12, repeals 53-3-18 NMSA 1978, relating to late filing of the annual report, assessment and notice of franchise tax, penalties and interest, effective July 1, 1979. For present provisions, see 53-3-16 and 53-3-17 NMSA 1978.

§§ 53-3-19 to 53-3-31. Repealed.

Repeals. - Laws 1986, ch. 20, § 136D repeals former 53-3-19 through 53-3-31 NMSA 1978, relating to the Franchise Tax Act, effective May 21, 1986. For provisions of former sections, see 1983 Replacement Pamphlet. For present provisions, see Article 2A of ch. 7 NMSA 1978.

### **§ 53-3-32. Repealed.**

Repeals. - Laws 1979, ch. 390, § 12, repeals 53-3-32 NMSA 1978, relating to fraud in the payment or collection of the franchise tax, effective July 1, 1979.

### **§ 53-3-33. Repealed.**

Repeals. - Laws 1986, ch. 20, § 136D repeals former 53-3-33 NMSA 1978, as enacted by Laws 1979, ch. 390, § 10, relating to the Franchise Tax Act, effective May 21, 1986. For provisions of former section, see 1983 Replacement Pamphlet. For present provisions, see Article 2A of ch. 7 NMSA 1978.

### **§ 53-3-34. Limitation of actions.**

No action or proceeding shall be brought to collect the franchise tax due or under an assessment or notice of the assessment of taxes after ten years from the date due or the date of such assessment or notice.

History: 1978 Comp., § 53-3-34, enacted by Laws 1979, ch. 390, § 11.

Effective dates. - Laws 1979, ch. 390, § 13, makes the act effective on July 1, 1979.

## **Article 4**

### **Cooperative Associations**

#### **§ 53-4-1. Definitions.**

Unless the subject matter or context requires otherwise, wherever used herein [53-4-1 to 53-4-45 NMSA 1978]:

A. "association" means a group enterprise legally incorporated hereunder, and shall be deemed to be a nonprofit corporation;

B. "member" means not only a member in a nonshare association but also a member in a share association;

C. "net savings" means the total income of an association minus the costs of operation;

D. "interest-dividends" means the return on share or membership capital which is limited in accordance with the provisions of Section 22 [53-4-22 NMSA 1978] herein;

E. "savings returns" means the amount returned to the patrons in proportion to their patronage in accordance with the provisions of Section 31 [53-4-31 NMSA 1978] herein;

F. "cooperative basis" as applied to any incorporated or unincorporated group not organized hereunder means:

(1) that each member has one vote and only one vote except as may be altered in the articles or by-laws [bylaws] by provision for voting by member organizations;

(2) that the maximum rate at which any return is paid on share or membership capital is limited;

(3) that the allocation or distribution of net savings after payment, if any, of said limited return on capital and after making provision for such separate funds as may be required or specially permitted by statute, articles or by-laws [bylaws], is made to member patrons, or to all patrons, in proportion to their partonage [patronage].

History: Laws 1939, ch. 164, § 1; 1941 Comp., § 54-1401; 1953 Comp., § 51-15-1.

Cross-references. - For disposition of unclaimed property, see 7-8-1 NMSA 1978 et seq. As to rural electric cooperatives, see 62-15-1 NMSA 1978 et seq. As to cooperative marketing associations of agricultural producers, see 76-12-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 64 Am. Jur. 2d Public Utilities § 5.

### **§ 53-4-2. Who may incorporate.**

Any five or more natural persons or two or more associations may incorporate hereunder.

History: Laws 1939, ch. 164, § 2; 1941 Comp., § 54-1402; 1953 Comp., § 51-15-2.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 1.

### **§ 53-4-3. Purposes.**

An association may be incorporated hereunder to engage in any one or more lawful mode or modes of acquiring, selling, producing, building, operating, manufacturing, furnishing, exchanging or distributing any type or types of property, commodities, goods or services, and for the transaction of any lawful business.

History: Laws 1939, ch. 164, § 3; 1941 Comp., § 54-1403; 1953 Comp., § 51-15-3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 4; 18 Am. Jur. 2d Corporations §§ 28, 30, 31; 18A Am. Jur. 2d Corporations §§ 192 to 198.

Farm or dairy products, cooperative marketing of, by producers' association, 25 A.L.R. 1113; 33 A.L.R. 247; 47 A.L.R. 936; 77 A.L.R. 405; 98 A.L.R. 1406; 12 A.L.R.2d 130. 18 C.J.S. Corporations §§ 37, 47, 55, 61; 43 C.J.S. Industrial Cooperative Societies § 3.

### **§ 53-4-4. Powers.**

An association shall have the capacity to act possessed by natural persons and the authority to do anything required or permitted herein and also:

- A. to continue as a corporation for the time specified in its articles;
- B. to have a corporate seal and to alter the same at pleasure;
- C. to sue and be sued in its corporate name;
- D. to make by-laws [bylaws] for the government and regulation of its affairs;
- E. to acquire, own, hold, sell, lease, pledge or mortgage any property incident to its purposes;

F. to own and hold membership in and share capital of other associations and corporations, and any types of bonds or other obligations; and while the owner thereof to exercise all the rights of ownership;

G. to borrow money, contract debts and make contracts, including agreements of mutual aid or federation with other associations and other groups organized on a cooperative basis;

H. to conduct its affairs without as well as within this state;

I. to exercise in addition any power granted to ordinary business corporations, save those powers inconsistent herewith;

J. to exercise all powers not inconsistent herewith which may be necessary, convenient, or expedient for the accomplishment of its purposes, and, to that end, the foregoing enumeration of powers shall not be deemed exclusive.

History: Laws 1939, ch. 164, § 4; 1941 Comp., § 54-1404; 1953 Comp., § 51-15-4.

Cross-references. - For disposition of unclaimed property, see 7-8-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 30 to 32; 18 Am. Jur. 2d Corporations §§ 28, 32, 33; 18A Am. Jur. 2d Corporations §§ 196, 197; 18B Am. Jur. 2d Corporations §§ 1990 to 1992, 1995 to 1999, 2001 to 2008, 2085.

Exemption of cooperative associations from operation of statutes relating to use of highways by private motor carriers and contract motor carriers for hire, 109 A.L.R. 550; 175 A.L.R. 1333.

Membership corporation or association or cooperative group furnishing to its members service commonly supplied by public utility, as subject to governmental regulation or to jurisdiction of public service commission, 132 A.L.R. 1495.

Validity and construction of provisions for liquidated damages in contract with cooperative marketing association, 12 A.L.R.2d 130.

19 C.J.S. Corporations §§ 933 to 1259; 43 C.J.S. Industrial Cooperative Societies § 6.

### **§ 53-4-5. Articles of incorporation; contents.**

Articles of incorporation shall be signed by each of the incorporators and acknowledged by at least three of them if natural persons, and by the presidents and secretaries, if associations, before an officer authorized to take acknowledgments.

Within the limitations set forth herein the articles shall contain:

A. a statement as to the purpose or purposes for which the association is formed;

- B. the name of the association which shall include the word "cooperative";
- C. the term of existence of the association which may be perpetual;
- D. the location and address of the principal office of the association;
- E. the names and addresses of the incorporators of the association;
- F. the names and addresses of the directors who shall manage the affairs of the association for the first year, unless sooner changed by the members;
- G. a statement of whether the association is organized with or without shares, and the number of shares or memberships subscribed for;
- H. if organized with shares the amount of authorized capital, the number and types of shares and the par value thereof which may be placed at any figure, and the rights, preference, and restrictions of each type of share;
- I. the minimum number of shares which must be owned in order to qualify for membership;
- J. the maximum amount or percentage of capital which may be owned or controlled by any member;
- K. the method by which any surplus, upon dissolution of the association, shall be distributed, in conformity with the requirements of Section 36 [53-4-36 NMSA 1978] herein for division of such surplus.

The articles may also contain any other provisions not inconsistent herewith.

History: Laws 1939, ch. 164, § 5; 1941 Comp., § 54-1405; 1953 Comp., § 51-15-5.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15; 18A Am. Jur. 2d Corporations §§ 199, 202, 203, 205, 206.  
18 C.J.S. Corporations §§ 51, 56, 61, 62, 67, 104, 189; 43 C.J.S. Industrial Cooperative Societies § 14.

### **§ 53-4-6. Articles of incorporation; filing; recordation; fees.**

The articles shall be filed with the state corporation commission of New Mexico together with a fee of twenty-five dollars (\$25.00) and shall be recorded with the county clerk of the county where the principal office is located for a fee of one dollar (\$1.00).

History: Laws 1939, ch. 164, § 6; 1941 Comp., § 54-1406; 1953 Comp., § 51-15-6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15; 18A Am. Jur. 2d Corporations §§ 208, 209, 211, 213, 214.  
18 C.J.S. Corporations §§ 51, 62.

### **§ 53-4-7. Articles of incorporation; amendments; fee.**

Amendments to the articles may be proposed by a two-thirds vote of the board of directors, or by petition of one-tenth of the association's members. Notice of the meeting to consider such amendment shall be sent by the secretary at least 30 days in advance thereof to each member at his last-known address, accompanied by the full text of the proposal and by that part of the articles to be amended. Two-thirds of the members voting may adopt said amendment and when verified by the president and secretary, it shall be filed with the state corporation commission of New Mexico within 30 days of its adoption, and a fee of ten dollars (\$10.00) shall be paid.

If the amendment is to alter the preferences of outstanding shares of any type, or to authorize the issuance of shares having preferences superior to outstanding shares of any type, the vote of two-thirds of the members owning the outstanding shares affected by the change shall also be required for the adoption of the amendment.

The amount of capital and the number and par value of shares may be diminished or increased by amendment of the articles, but the capital shall not be diminished below the amount of paid-up capital existing at the time of amendment.

History: Laws 1939, ch. 164, § 7; 1941 Comp., § 54-1407; 1953 Comp., § 51-15-7.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15; 18 Am. Jur. 2d Corporations §§ 79 to 95.  
18 C.J.S. Corporations §§ 51, 62.

### **§ 53-4-8. Adoption, amendment, or repeal of by-laws [bylaws].**

By-laws [bylaws] shall be adopted, amended, or repealed by a majority vote of the members voting.

History: Laws 1939, ch. 164, § 8; 1941 Comp., § 54-1408; 1953 Comp., § 51-15-8.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15; 18A Am. Jur. 2d Corporations §§ 327 to 330, 332.  
18 C.J.S. Corporations § 188.

### **§ 53-4-9. Contents of by-laws [bylaws].**

The by-laws [bylaws] may, within the limitations set forth herein provide for:

- A. the method and terms of admission to membership and the disposal of members' interests on cessation of membership for any reason;
- B. the time, place and manner of calling and conducting meetings;
- C. the number or percentage of the members constituting a quorum;
- D. the number, qualifications, powers, duties, term of office, and manner, time and vote for election, of directors and officers; and the classification, if any, of directors;
- E. the compensation, if any, of the directors, and the number of directors necessary to constitute a quorum;
- F. the method of distributing the net savings;
- G. the various discretionary provisions herein as well as other provisions incident to the purposes and activities of the association.

History: Laws 1939, ch. 164, § 9; 1941 Comp., § 54-1409; 1953 Comp., § 51-15-9.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15; 18 Am. Jur. 2d Corporations §§ 17, 18; 18A Am. Jur. 2d Corporations §§ 310, 311, 314 to 318, 320, 321, 323, 325, 326, 331.  
18 C.J.S. Corporations §§ 186, 189; 43 C.J.S. Industrial Cooperative Societies § 4.

### **§ 53-4-9.1. Indemnification of officers and directors.**

Each association shall have the power to indemnify any director or officer or former director or officer of the association against reasonable expenses, costs and attorneys' fees actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been a director or officer. The indemnification may include any amounts paid to satisfy a judgment or to compromise or settle a claim. The director or officer shall not be indemnified if he shall be adjudged to be liable on the basis that he has breached or failed to perform the duties of his office and the breach or failure to perform constitutes willful misconduct or recklessness. Advance indemnification may be allowed of a director or officer for reasonable expenses to be incurred in connection with the defense of the action, suit or proceeding, provided that the director or officer shall reimburse the association if it is subsequently determined that the director or officer was not entitled to indemnification. Each association may make any other indemnification as authorized by the articles of incorporation or bylaws or by a resolution adopted after notice by the members entitled to vote. As used in this section, "director" means any

person who is or was a director of the association and any person who, while a director of the association, is or was serving at the request of the association as a director, officer, partner, trustee, employee or agent of any foreign or domestic corporation or nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust.

History: 1978 Comp., § 53-4-9.1, enacted by Laws 1987, ch. 238, § 1.

Cross-references. - Also on indemnification of officers and directors, see 53-8-26 NMSA 1978.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

Law reviews. - For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

### **§ 53-4-10. Regular and special meetings.**

Regular meetings of members shall be held as prescribed in the by-laws [bylaws], but shall be held at least once a year. Special meetings may be demanded by a majority vote of the directors or by written petition of at least one-tenth of the members, in which case it shall be the duty of the secretary to call such meeting to take place within 30 days after such demand. Regular or special meetings, including meetings by units as hereinafter provided, may be held within or without this state as the articles or by-laws [bylaws] may prescribe.

History: Laws 1939, ch. 164, § 10; 1941 Comp., § 54-1410; 1953 Comp., § 51-15-10.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1456, 1461, 1464, 1465, 1467, 1470, 1471.

18 C.J.S. Corporations § 189; 43 C.J.S. Industrial Cooperative Societies § 12.

### **§ 53-4-11. Notice of meeting.**

The secretary shall give notice of the time and place of meetings by sending a notice thereof to each member at his last-known address not less than the number of days in advance of the meeting specified in the by-laws [bylaws]. In case of a special meeting the notice shall specify the purpose for which such meeting is called.

History: Laws 1939, ch. 164, § 11; 1941 Comp., § 54-1411; 1953 Comp., § 51-15-11.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1448, 1452 to 1455, 1457, 1458, 1460, 1480 to 1482.  
18 C.J.S. Corporations § 269.

### **§ 53-4-12. Meetings by units of the membership.**

The articles or by-laws [bylaws] may provide for the holding of meetings by units of the membership and may provide for a method of transmitting the votes there cast to the central meeting, or for a method of representation by the election of delegates to the central meeting; or for a combination of both such methods.

History: Laws 1939, ch. 164, § 12; 1941 Comp., § 54-1412; 1953 Comp., § 51-15-12.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1466, 1467, 1684 to 1686, 1726, 1727.

### **§ 53-4-13. One member - one vote.**

Each member of an association shall have one and only one vote, except that, where an association has, as members, other associations, or groups organized on a cooperative basis, the voting rights of such member associations or groups may be prescribed in the article or by-laws [bylaws].

No voting agreement or other device to evade the one member-one vote rule shall be enforceable at law or in equity.

History: Laws 1939, ch. 164, § 13; 1941 Comp., § 54-1413; 1953 Comp., § 51-15-13.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 1476.  
18 C.J.S. Corporations § 548.

### **§ 53-4-14. No proxy.**

No member shall be permitted to vote by proxy.

History: Laws 1939, ch. 164, § 14; 1941 Comp., § 54-1414; 1953 Comp., § 51-15-14.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 32; 18B Am. Jur. 2d Corporations § 1478.  
18 C.J.S. Corporations § 550.

### **§ 53-4-15. Voting by mail.**

The articles or by-laws [bylaws] may provide for either or both of the following types of voting by mail:

A. that the secretary shall send to the members a copy of any proposed schedule to be offered at a meeting, together with the notice of said meeting, and that the mail votes cast by the members shall be counted together with those cast at the meeting if such mail votes are returned to the association within a specified number of days;

B. that the secretary shall send to any member absent from a meeting an exact copy of the proposal acted upon at the meeting, and that the mail vote of the member upon such proposal, if returned within a specified number of days, shall be counted together with the votes cast at said meeting.

The articles or by-laws [bylaws] may also determine whether and to what extent mail votes shall be counted in computing a quorum.

History: Laws 1939, ch. 164, § 15; 1941 Comp., § 54-1415; 1953 Comp., § 51-15-15.

### **§ 53-4-16. Application of voting provisions herein to voting by mail.**

If an association has provided for voting by mail, any provision herein referring to votes cast by the members shall be construed to include the votes cast by mail.

History: Laws 1939, ch. 164, § 16; 1941 Comp., § 54-1416; 1953 Comp., § 51-15-16.

### **§ 53-4-17. Application of voting provisions herein to voting by delegates.**

If an association has provided for voting by delegates, any provision herein referring to votes cast by the members shall apply to votes cast by delegates; but this shall not permit delegates to vote by mail.

History: Laws 1939, ch. 164, § 17; 1941 Comp., § 54-1417; 1953 Comp., § 51-15-17.

### **§ 53-4-18. Directors.**

An association shall be managed by a board of not less than five directors, who shall be elected by and from the members of the association, and shall hold office until their successors are elected, or until removed. Vacancies in the board of directors, otherwise than by removal or expiration of term, shall be filled in such manner as the by-laws [bylaws] may provide.

The by-laws [bylaws] may provide for a method of apportioning the number of directors among the units into which the association may be divided, and for the election of directors by the respective units to which they are apportioned.

An executive committee of the board of directors may be elected in such a manner and with such powers and duties as the articles or by-laws [bylaws] may prescribe.

Meetings of directors or of the executive committee may be held within or without the state.

History: Laws 1939, ch. 164, § 18; 1941 Comp., § 54-1418; 1953 Comp., § 51-15-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 18, 19; 18A Am. Jur. 2d Corporations §§ 953 to 955, 986, 1159; 18B Am. Jur. 2d Corporations §§ 1362, 1363, 1365, 1366, 1371, 1381.  
19 C.J.S. Corporations §§ 742 to 751; 43 C.J.S. Industrial Cooperative Societies § 8.

### **§ 53-4-18.1. Duties of directors.**

A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director believes to be in or not opposed to the best interests of the association and with such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties, a director shall be entitled to rely on factual information, opinions, reports or statements including financial statements and other financial data in each case prepared or presented by:

A. one or more officers or employees of the association whom the director reasonably believes to be reliable and competent in the matters presented;

B. counsel, public accountants or other persons as to matters which the director reasonably believes to be within such persons' professional or expert competence; or

C. a committee of the board upon which the director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws as to matters within its designated authority, which committee the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

History: 1978 Comp., § 53-4-18.1, enacted by Laws 1987, ch. 238, § 2.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

## **§ 53-4-18.2. Liability of directors.**

No director of the association shall be personally liable to the association or its members for monetary damages for breach of fiduciary duty as a director unless:

A. the director has breached or failed to perform the duties of the director's office in compliance with Section 53-4-18.1 NMSA 1978; and

B. the breach or failure to perform constitutes willful misconduct or recklessness.

The provisions of this section shall, however, only eliminate the liability of a director for action taken as a director or any failure to take action as a director at meetings of the board of directors or of a committee of the board of directors on or after the date when the provisions of this section become effective.

History: 1978 Comp., § 53-4-18.2, enacted by Laws 1987, ch. 238, § 3.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

Compiler's notes. - The phrase "the date when the provisions of this section become effective" in the last sentence refers to April 9, 1987, the effective date of Laws 1987, Chapter 238.

## **§ 53-4-19. Officers.**

The officers of an association shall include a president, one or more vice presidents, a secretary and a treasurer or a secretary-treasurer. The officers shall be elected annually by the directors unless the by-laws [bylaws] otherwise provide. The president and at least one vice president must be directors, but no other officer need be a director.

History: Laws 1939, ch. 164, § 19; 1941 Comp., § 54-1419; 1953 Comp., § 51-15-19.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 33, 35; 18B Am. Jur. 2d Corporations §§ 1360, 1361, 1364, 1406. 19 C.J.S. Corporations §§ 715 to 725; 43 C.J.S. Industrial Cooperative Societies § 8.

## **§ 53-4-20. Removal of directors and officers.**

A director or officer may be removed with or without cause, by a vote of two-thirds of the members voting at a regular or special meeting. The director or officer involved shall have an opportunity to be heard at said meeting. A vacancy caused by any such

removal shall be filled by the vote provided in the by-laws [bylaws] for election of directors.

History: Laws 1939, ch. 164, § 20; 1941 Comp., § 54-1420; 1953 Comp., § 51-15-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1430, 1432, 1439, 1440, 1443, 1690, 2065, 2077, 2078.  
19 C.J.S. Corporations § 738; 43 C.J.S. Industrial Cooperative Societies § 8.

## **§ 53-4-21. Referendum.**

The articles or by-laws [bylaws] may provide that within a specified period of time any action taken by the directors must be referred to the members for approval or disapproval if demanded by petition of at least ten percent (10%) of all the members or by vote of at least a majority of the directors. However, the rights of third parties which have vested between the time of such action and such referendum shall not be impaired thereby.

History: Laws 1939, ch. 164, § 21; 1941 Comp., § 54-1421; 1953 Comp., § 51-15-21.

### **§ 53-4-21.1. Disposition of property.**

An association may not sell, convey, lease, exchange, transfer or otherwise dispose of all or any substantial portion of its property unless such sale, conveyance, lease, exchange, transfer or other disposition is authorized at a duly held meeting of the members thereof by the affirmative vote of not less than two-thirds of all of the members of the association and unless the notice of such proposed sale, lease or other disposition shall have been contained in the notice of the meeting; provided, however, that notwithstanding anything herein contained or any other provisions of law, the board of directors of an association, without authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a deed or deeds of trust upon, or the pledging, assignment for security purposes or encumbering of any or all of the property, assets, rights, privileges, licenses, franchises and permits of the association, whether acquired or to be acquired and wherever situated, as well as the revenues and income therefrom, all upon such terms and conditions as the board of directors shall determine, to secure any indebtedness of the association.

History: 1978 Comp., § 53-4-21.1, enacted by Laws 1987, ch. 238, § 4.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately.  
Approved April 9, 1987.

### **§ 53-4-22. Limitations on interest-dividends.**

Interest-dividends shall not exceed fifteen percent per year and shall be noncumulative. Total interest-dividends distributed for any single period shall not exceed fifty percent of the net savings for that period.

History: Laws 1939, ch. 164, § 22; 1941 Comp., § 54-1422; 1953 Comp., § 51-15-22; Laws 1983, ch. 14, § 1.

The 1983 amendment combined the former first and second paragraphs into the present single paragraph and substituted "fifteen percent per year" for "six percent per annum" in the first sentence.

Effective dates. - Laws 1983, ch. 14, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 22; 18B Am. Jur. 2d Corporations §§ 1175, 1263 to 1276, 1305.

Distribution of funds by nonprofit corporation absent dissolution, 51 A.L.R.3d 1318.

Validity and enforceability of bylaw amendment reducing benefits available to members, 61 A.L.R.3d 976.

18 C.J.S. Corporations § 467.

### **§ 53-4-23. Eligibility and admission to membership.**

Any natural person, association, incorporated or unincorporated group organized on a cooperative basis, or any nonprofit group shall be eligible for membership in an association if it has met any qualifications for eligibility stated in the articles or by-laws [bylaws], and shall be deemed a member upon payment in full for the minimum amount of share or membership capital stated in the articles as necessary to qualify for membership.

History: Laws 1939, ch. 164, § 23; 1941 Comp., § 54-1423; 1953 Comp., § 51-15-23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 14, 21; 18A Am. Jur. 2d Corporations §§ 728 to 730.

18 C.J.S. Corporations § 55.

### **§ 53-4-24. Subscribers.**

Any natural person or group eligible for membership and legally obligated to purchase a share or shares of, or membership in, an association shall be deemed a subscriber; the articles or by-laws [bylaws] may determine whether, and the conditions under which, any rights of membership shall be granted to subscribers.

History: Laws 1939, ch. 164, § 24; 1941 Comp., § 54-1424; 1953 Comp., § 51-15-24.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 578 to 580.

### **§ 53-4-25. Share and membership certificates; issuance and contents.**

No certificate for shares or for membership shall be issued until paid for in full. There shall be printed upon each certificate issued by an association a statement embodying the requirements of Sections 13, 14 and 26 [53-4-13, 53-4-14 and 53-4-26 NMSA 1978] herein and of any provisions in its articles which limit the right of the certificate holder to assign or transfer such certificate.

History: Laws 1939, ch. 164, § 25; 1941 Comp., § 54-1425; 1953 Comp., § 51-15-25.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 42, 45; 18A Am. Jur. 2d Corporations §§ 663, 736, 890.  
18 C.J.S. Corporations § 62; 43 C.J.S. Industrial Cooperatives § 12.

### **§ 53-4-26. Transfer of shares and membership; withdrawal.**

If a member desires to withdraw from the association or dispose of any or all of his holdings therein, the directors shall have the power to purchase such holdings by paying him out of surplus funds the par value of any or all of the holdings offered. The directors shall then reissue or cancel the same. A vote of the majority of the members voting at a regular or special meeting may order the directors to exercise this power to purchase.

If the association fails, within 60 days of the original offer, to purchase all or any part of the holdings offered, the member may dispose of the unpurchased interest elsewhere, subject to the approval of the transferee by a majority vote of the directors. Any would-be transferee not approved by the directors may appeal to the members at their first regular or special meeting thereafter, and the action of the meeting shall be final. If such transferee is not approved, the directors are under a duty to exercise their power to purchase, if and when there are sufficient surplus funds.

History: Laws 1939, ch. 164, § 26; 1941 Comp., § 54-1426; 1953 Comp., § 51-15-26.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 25; 18A Am. Jur. 2d Corporations §§ 689 to 691, 699.  
43 C.J.S. Industrial Cooperative Societies § 19.

### **§ 53-4-27. Share and membership certificates; recall.**

The by-laws [bylaws] may give the directors the power to use the surplus funds to recall, at par value, the holdings of any member in excess of the amount requisite for membership; and may also provide that if any member has failed to patronize the association during a period of time specified in the by-laws [bylaws], the directors may use the surplus funds to recall all his holdings and thereupon he shall cease to be a member of the association. When so recalled, such share or membership certificates shall be either reissued or canceled.

History: Laws 1939, ch. 164, § 27; 1941 Comp., § 54-1427; 1953 Comp., § 51-15-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 488, 541, 542.

43 C.J.S. Industrial Cooperative Societies § 19.

### **§ 53-4-28. Share and membership certificates,[:] attachment.**

The holdings of any member of an association, to the extent of the minimum amount necessary for membership, shall be exempt from attachment, execution, or garnishment for the debts of the owner. If any holdings in excess of this amount are subject to such liability, the directors of the association may either admit the purchaser thereof to membership, or may, if and when there are sufficient surplus funds, purchase from him such holdings at par value.

History: Laws 1939, ch. 164, § 28; 1941 Comp., § 54-1428; 1953 Comp., § 51-15-28.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Industrial Cooperative Societies § 10.

### **§ 53-4-29. Liability of members.**

Members shall not be jointly or severally liable for any debts of the association, nor shall subscribers be so liable except to the extent of the unpaid amount on the shares or membership certificates subscribed by them. No subscriber shall be released from such liability by reason of any assignment of his interest in the shares or membership certificate, but shall remain jointly and severally liable with the assignee until the shares or certificates are fully paid up.

History: Laws 1939, ch. 164, § 29; 1941 Comp., § 54-1429; 1953 Comp., § 51-15-29.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 30 to 32; 18A Am. Jur. 2d Corporations §§ 249 to 257.

Liability of member or former member of marketing or purchasing cooperative for its debts or losses, 96 A.L.R.3d 1243.  
18 C.J.S. Corporations §§ 652 to 659.

### **§ 53-4-30. Expulsion.**

A member may be expelled by the vote of a majority of the members voting at a regular or special meeting. The member against whom the charges are to be preferred shall be informed thereof in writing at least 10 days in advance of the meeting, and shall have an opportunity to be heard in person or by counsel at said meeting. On decision of the association to expel a member, the board of directors shall purchase the member's holdings at par value, if and when there are sufficient surplus funds.

History: Laws 1939, ch. 164, § 30; 1941 Comp., § 54-1430; 1953 Comp., § 51-15-30.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 15, 26; 18A Am. Jur. 2d Corporations §§ 935 to 938, 940 to 942, 944 to 947.  
18 C.J.S. Corporations § 481.

### **§ 53-4-31. Allocation and distribution of net savings.**

At least once a year the members and/or the directors, as the articles or by-laws [bylaws] may provide, shall apportion the net savings of the association in the following order:

A. not less than ten percent (10%) shall be placed in a surplus fund until such time as the fund shall equal at least fifty percent (50%) of the paid-up capital;

B. interest-dividends, within the limitations of Section 22 [53-4-22 NMSA 1978] may be paid upon share capital, or, if the by-laws [bylaws] so provide, upon the membership certificates of a nonshare association;

C. a portion of the remainder, as determined by the articles or by-laws [bylaws], shall be allocated to an educational fund to be used in teaching cooperation, and a portion may also be allocated to funds for the general welfare of the members of the association;

D. the remainder shall be allocated at the same uniform rate to all patrons of the association in proportion to their individual patronage, provided that:

(1) in the case of a member patron, his proportionate amount of savings return shall be distributed to him;

(2) in the case of a subscriber, his proportionate amount of savings return may, as the articles or by-laws [bylaws] provide, be distributed to him or credited to his account until

the amount of capital subscribed for has been fully paid;

(3) in the case of nonmember patrons their proportionate amount of savings returns shall be set aside in a general fund for such patrons and shall be allocated to individual nonmember patrons only upon request and presentation of evidence of the amount of their patronage. Any savings return so allocated shall be credited to such patron towards payment of the minimum amount of share or membership capital necessary for membership. When a sum equal to this amount has been accumulated at any time within a period of time specified in the by-laws [bylaws], such patron shall be deemed and become a member of the association if he so agrees or requests, and complies with any provisions in the bylaws for admission to membership. The certificates of shares or membership to which he is entitled shall then be issued to him;

(4) if within any periods of time specified in the articles or by-laws [bylaws], (a) any subscriber has not accumulated and paid in the amount of capital subscribed for; or (b) any nonmember patron has not accumulated in his individual account the sum necessary for membership; or (c) any nonmember patron has accumulated the sum necessary for membership but does not request or agree to become a member or fails to comply with the provisions of the bylaws, if any, for admission to membership, then: the amounts so accumulated or paid in and any part of the general fund for nonmember patrons, which has not been allocated to individual nonmember patrons, shall go to the educational fund and thereafter no member or other patron shall have any rights in said paid in [paid-in] capital or accumulated savings returns as such.

History: Laws 1939, ch. 164, § 31; 1941 Comp., § 54-1431; 1953 Comp., § 51-15-31.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 22; 18B Am. Jur. 2d Corporations §§ 1168, 1169.

Distribution of funds by nonprofit corporation absent dissolution, 51 A.L.R.3d 1318.  
19 C.J.S. Corporations § 1169.

### **§ 53-4-32. Bonding.**

Every individual acting as officer or employee of an association and handling funds or securities amounting to one thousand dollars (\$1,000.00) or more, in any one year, shall be covered by an adequate bond as determined by the board of directors, and at the expense of the association; and the by-laws [bylaws] may also provide for the bonding of other employees or officers.

History: Laws 1939, ch. 164, § 32; 1941 Comp., § 54-1432; 1953 Comp., § 51-15-32.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees §§ 491, 499, 500.  
19 C.J.S. Corporations § 731.

### **§ 53-4-33. Books; auditing.**

To record its business operation, every association shall keep a set of books, which shall be audited at the end of each fiscal year by an experienced bookkeeper or accountant who shall not be an officer or director. Where the annual business amounts to less than ten thousand dollars [(\$10,000)], the audit may be performed by an auditing committee of three, who shall not be directors, officers, or employees. A written report of the audit, including a statement of the amount of business transacted with members, and the amount transacted with nonmembers, the balance sheet, and the income and expenses, shall be submitted to the annual meeting of the association.

History: Laws 1939, ch. 164, § 33; 1941 Comp., § 54-1433; 1953 Comp., § 51-15-33.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 14, 21; 18A Am. Jur. 2d Corporations §§ 348 to 354, 356 to 363, 365 to 368, 381, 383, 384.

18 C.J.S. Corporations § 191.

### **§ 53-4-34. Annual report.**

Every association shall annually, within 60 days of the close of its operations for that year, make a report of its condition sworn to by the president and secretary, which report shall be filed with the state corporation commission of New Mexico. The report shall state:

- A. the name and principal address of the association;
- B. the names, addresses, occupations, and date of expiration of the terms, of the officers and directors, and their compensation, if any;
- C. the amount and nature of its authorized, subscribed and paid-in capital, the number of its shareholders, the par value of its shares, and the rate at which any interest-dividends have been paid. For nonshare associations the annual report shall state the total number of members, the number admitted or withdrawn during the year and the amount of membership fees received;
- D. the receipts, expenditures, assets and liabilities of the association.

A copy of this report shall be kept on file at the principal office of the association.

Any person who shall subscribe or make oath to such report containing a false statement, known to such person to be false, shall upon conviction thereof be fined not exceeding five hundred dollars (\$500.00) or imprisoned not exceeding one year, or both.

History: Laws 1939, ch. 164, § 34; 1941 Comp., § 54-1434; 1953 Comp., § 51-15-34.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 362.  
19 C.J.S. Corporations § 987.

### **§ 53-4-35. Notice of delinquent reports; forfeitures; reinstatement.**

If an association fails to make such report within the required period of 60 days, the state corporation commission of New Mexico shall within 60 days from the expiration of said period send such association a registered letter directed to its principal office, stating the delinquency and its consequences. If the association fails to file the report within 60 days from the mailing of such notice, the state corporation commission shall notify it by registered letter that its corporate rights stand forfeited, shall remove its name from their list of live corporations, and notify the attorney general who shall cause its affairs to be wound up. If, within 60 days from such forfeiture, the association shall file the report and pay a penalty of ten dollars (\$10.00) and all actual expenses of any suit begun to wind it up, the corporation commission shall set aside such forfeiture, such suit shall be dismissed, and the association shall be reinstated to its former rights and legal status.

History: Laws 1939, ch. 164, § 35; 1941 Comp., § 54-1435; 1953 Comp., § 51-15-35.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 22; 19 Am. Jur. 2d Corporations §§ 2734, 2740, 2741, 2746, 2788 to 2805, 2807 to 2810.  
19 C.J.S. Corporations § 1665.

### **§ 53-4-36. Voluntary dissolution.**

An association may, at any regular or special meeting legally called, be directed to dissolve by a vote of two-thirds of the entire membership. By a vote of a majority of the members voting three of their number shall be designated as trustees, who shall, on behalf of the association and within a time fixed in their designation or within any extension thereof, liquidate its assets, pay its debts and expenses; return to the members the par value of their shares or of their membership certificates; return to subscribers the amount paid on their subscriptions, to patrons the amount of savings returns credited to their accounts toward purchase of shares or membership certificates; and distribute any surplus in either or both of the following ways, as the articles may provide:

A. among those patrons who have been members or subscribers at any time during the past six years, on the basis of their patronage during that period;

B. as a gift to any consumers' cooperative association or other nonprofit enterprise which may be designated in the articles.

History: Laws 1939, ch. 164, § 36; 1941 Comp., § 54-1436; 1953 Comp., § 51-15-36.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations § 22; 19 Am. Jur. 2d Corporations §§ 2740, 2741, 2746, 2748, 2750 to 2756, 2758 to 2762, 2764 to 2766, 2770 to 2778, 2780, 2781, 2785, 2834, 2880 to 2883.  
19 C.J.S. Corporations §§ 1684 to 1689.

### **§ 53-4-37. Use of name "cooperative"; penalty.**

Only (1) associations organized hereunder, (2) groups organized on a cooperative basis under any other law of this state, and (3) foreign corporations authorized to do business in this state on a cooperative basis under this or any other law of this state, shall be entitled to use the term "cooperative" or any abbreviation or derivation thereof, as part of their business name, or to represent themselves, in their advertising or otherwise, as conducting business on a cooperative basis.

Any person, firm, or corporation violating the above provision shall be guilty of a misdemeanor, and punishable by a fine of not more than \$200.00, and the attorney general or any aggrieved individual, or association, or group organized on a cooperative basis may sue to enjoin an alleged violation of this section.

Should the courts or the attorney general or the state corporation commission decide that any person, firm, or corporation, using the name "cooperative" prior to these provisions, and not organized on a cooperative basis, is entitled to continue in such use, any such business shall always place immediately after its name, the words "does not comply with the cooperative laws of New Mexico," in the same kind of type, and in letters not less than two-thirds as large, as those used in the term "cooperative."

History: Laws 1939, ch. 164, § 37; 1941 Comp., § 54-1437; 1953 Comp., § 51-15-37.

Cross-references. - As to optional use of "cooperative" in title of cooperative marketing association of agricultural producers, see 76-12-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 5 to 9.  
18 C.J.S. Corporations § 173.

### **§ 53-4-38. Promotion expenses; limitations; penalty.**

An association shall not, directly or indirectly, use any of its funds, nor issue shares nor incur any indebtedness, for the payment of any promotion expenses or compensation

for the organization of the association in excess of 5% of the amount paid in for the shares or membership certificates involved in the promotion transaction. Any association giving, or any person, firm, corporation or association receiving, such promotion commission in violation of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00).

History: Laws 1939, ch. 164, § 38; 1941 Comp., § 54-1438; 1953 Comp., § 51-15-38.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 98, 101 to 105.

18 C.J.S. Corporations §§ 119 to 143.

### **§ 53-4-39. Spreading false reports; penalty.**

Any person, firm, corporation or association which maliciously and knowingly spreads false reports about the management or finances of any association shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00) for each such offense.

History: Laws 1939, ch. 164, § 39; 1941 Comp., § 54-1439; 1953 Comp., § 51-15-39.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1885, 1887, 1888, 2130.

19 C.J.S. Corporations §§ 896, 916, 931.

### **§ 53-4-40. Existing cooperative corporations.**

Any group incorporated under another law of this state and operating on a cooperative basis may elect by a vote of two-thirds of the members voting to secure the benefits of and be bound by these provisions, and shall thereupon amend such of its articles and by-laws [bylaws] as are not in conformity with these provisions. A certified copy of the amended articles shall be filed with the corporation commission and a fee of twenty-five dollars (\$25.00) shall be paid.

History: Laws 1939, ch. 164, § 40; 1941 Comp., § 54-1440; 1953 Comp., § 51-15-40.

### **§ 53-4-41. Foreign corporations.**

A foreign corporation operating on a cooperative basis and complying with the applicable laws of the state wherein it is organized, shall be entitled to receive from the corporation commission a certificate authorizing it to do business in this state as a foreign cooperative corporation.

History: Laws 1939, ch. 164, § 41; 1941 Comp., § 54-1441; 1953 Comp., § 51-15-41.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 513.  
20 C.J.S. Corporations § 1818.

### **§ 53-4-42. Legality declared; not in restraint of trade.**

No association, or method or act thereof which complies with these provisions shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily, or to accomplish any improper or illegal purposes.

History: Laws 1939, ch. 164, § 42; 1941 Comp., § 54-1442; 1953 Comp., § 51-15-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Cooperative Associations §§ 30, 34.

Construction of § 1 of the Capper-Volstead Act (7 U.S.C. § 291) authorizing persons engaged in production of agricultural products to act together in association, 20 A.L.R. Fed. 924.

18 C.J.S. Corporations § 189.

### **§ 53-4-43. Laws not applicable.**

No law of this state conflicting or inconsistent herewith shall, to the extent of the conflict or inconsistency be construed as applicable to associations formed hereunder.

History: Laws 1939, ch. 164, § 43; 1941 Comp., § 54-1443; 1953 Comp., § 51-15-43.

### **§ 53-4-44. Subsequent laws.**

No law of this state subsequent to these provisions shall be construed as amending or repealing these provisions or any part thereof unless such amendment or repeal is expressly stated therein.

History: Laws 1939, ch. 164, § 44; 1941 Comp., § 54-1444; 1953 Comp., § 51-15-44.

### **§ 53-4-45. Taxation.**

Associations formed hereunder, and foreign corporations admitted under Section 41 [53-4-41 NMSA 1978] to do business in this state, shall pay an annual license fee of five dollars (\$5.00).

History: Laws 1939, ch. 164, § 45; 1941 Comp., § 54-1445; 1953 Comp., § 51-15-45.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2802, 2824, 2839.

## **Article 5**

### **Corporate Reports**

#### **§ 53-5-1. Short title.**

This act may be cited as the "Corporate Reports Act."

History: 1953 Comp., § 51-21-1, enacted by Laws 1959, ch. 181, § 1.

Meaning of "this act". - The term "this act", referred to in this section, refers to Laws 1959, ch. 181, which is compiled as 53-5-1, 53-5-3, 53-5-4 and 53-5-6 to 53-5-9 NMSA 1978.

Law reviews. - For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Resources J. 415 (1976).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

#### **§ 53-5-2. Corporate and supplemental reports.**

A. Pursuant to rules and regulations which the state corporation commission shall adopt in order to implement this section, every domestic or foreign corporation which is not exempted shall file in the office of the state corporation commission within thirty days after the date on which its certificate of incorporation or its certificate of authority, as the case may be, is issued by the commission, and biannually thereafter on or before the fifteenth day of the third month following the end of its taxable year, a corporate report in the form prescribed and furnished to the corporation, not less than thirty days prior to such reporting date, by the commission, and signed and sworn to by the chairman of the board, president, vice president, secretary, principal accounting officer or authorized agent of the corporation, showing among other information prescribed by the commission:

(1) the current status of:

(a) the name of the corporation;

(b) the mailing address and 1) street address if within a municipality; or 2) rural route number and box number, or the geographical location, using well-known landmarks, if outside a municipality, of its registered office in this state and the name of the agent upon whom process against the corporation may be served;

(c) the names and addresses of all the directors and officers of the corporation and when the term of office of each expires;

(d) the character of its business and the address of its principal place of business within the state and, if a foreign corporation, the address of its registered office in the state or country under the laws of which it is incorporated and the principal office of the corporation, if different from the registered office; and

(e) the date for the next annual meeting of the shareholders for the election of directors;

(2) the corporation's taxpayer identification number issued by the revenue division of the taxation and revenue department.

B. When the state corporation commission receives a report required to be filed by a corporation under the Corporate Reports Act, it shall determine if the report conforms to the requirements of this section. If the commission finds that the report conforms, it shall be filed. If the commission finds that the report does not conform, it shall promptly return the report to the corporation for any necessary corrections, in which event the penalties prescribed in the Corporate Reports Act for failure to file the report in the time provided shall not apply if the report is corrected and returned to the commission within thirty days from the date on which it was mailed to the corporation by the commission.

C. The state corporation commission may refuse to file a corporate report or a supplemental report received from a corporation which has not paid all fees including penalties and interest due and payable to the commission at the time of filing. However, if the corporation and the commission are engaged in any adversary proceeding over the assessment of any fees or franchise taxes, the commission shall file the report of the corporation upon its submission to the commission.

D. A supplemental report shall be filed with the state corporation commission within thirty days if, after the filing of the corporate report required under the Corporate Reports Act, a change is made in:

(1) the name of the corporation;

(2) the mailing address, street address, rural route number, box number or the geographical location of its registered office in this state and the name of the agent

upon whom process against the corporation may be served;

(3) the name or address of any of the directors or officers of the corporation or the date when the term of office of each expires; or

(4) the character of its business and its principal place of business within or without the state.

History: 1953 Comp., § 51-21-1, enacted by Laws 1978, ch. 9, § 1; 1979, ch. 181, § 1; 1983, ch. 304, § 4; 1989, ch. 386, § 1.

Cross-references. - For filing fee, see 53-2-1 NMSA 1978. As to penalty for failure to file corporate reports, see 53-5-7 NMSA 1978.

Repeals and reenactments. - Laws 1978, ch. 9, § 1, repealed former 51-21-2, 1953 Comp. (former 53-5-2 NMSA 1978), relating to annual corporate reports, and enacted a new 51-21-2, 1953 Comp.

The 1983 amendment substituted the present catchline for "Annual and supplemental corporate reports"; in the introductory language of Subsection A inserted "Pursuant to . . . this section," substituted "biannually" for "annually" and inserted "corporate" preceding "report" near the middle of the introductory language, and inserted "chairman of the board" and "among other information prescribed by the commission" near the end of the introductory language; substituted "corporation" for "company" in Subparagraph (c) of Paragraph (1) of Subsection A, substituted "shareholders" for "stockholders" in Subparagraph (e) of Paragraph (1), substituted "taxable" for "preceding fiscal" and inserted "the following information for the reporting period of the report" in the introductory language of Paragraph (2), rewrote Subparagraph (a) of Paragraph (2), substituted "reporting period" for "preceding year" in Subparagraph (c) of Paragraph (2), substituted "authorized shares" for "capital stock" in Subparagraph (e) of Paragraph (2); inserted "state corporation" in the first sentence of Subsection B; inserted "state corporation," substituted "may" for "shall," substituted "a corporate" for "an annual," and deleted "and franchise taxes" preceding "including" in the first sentence of Subsection C, deleted "annual" preceding "report" in the last sentence of Subsection C; inserted "state corporation" and substituted "corporate" for "annual" preceding "report" in the introductory language of Subsection D; and deleted Subsection E, which read: "No annual or supplemental report required to be filed under this section shall be deemed to have been filed if the fees accompanying the report have been paid by check, and which check is dishonored upon presentation."

The 1989 amendment, effective January 1, 1990, in Subsection A substituted all of the present language of Subparagraph (1)(b) preceding "if outside a municipality" for "the mailing address, and street address if within a municipality, or a description of the geographical location", deleted former Paragraph (2), which provided for reporting information on the number of shares, value and location of property, gross receipts and financial condition, and redesignated former Paragraph (3) as present Paragraph (2);

and in Subsection D(2) substituted "rural route number, box number or" for "or the description of".

Effective dates. - Laws 1978, ch. 9, § 2, makes the act effective on March 31, 1978.

Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Emergency clauses. - Laws 1978, ch. 9, § 3, makes the act effective immediately. Approved February 15, 1978.

Corporate Reports Acts. - See 53-5-1 NMSA 1978 and notes thereto.

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M. L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 333, 339. 19 C.J.S. Corporations § 987.

### **§ 53-5-3. Corporation commission to supply definitions.**

The corporation commission shall prepare and make available with appropriate corporate report forms a list of definitions of corporate and financial terms used in the annual corporate reports.

History: 1953 Comp., § 51-21-3, enacted by Laws 1959, ch. 181, § 3.

Law reviews. - For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

### **§ 53-5-4. Exempt corporations.**

The following corporations shall be exempt from filing a report pursuant to the Corporate Reports Act:

A. state banks or insurance companies incorporated under the laws of New Mexico;

B. insurance companies which are incorporated under the laws of the United States, other states or foreign countries, and which are licensed to transact business in the state of New Mexico;

C. national banks; and

D. nonprofit corporations.

History: 1953 Comp., § 51-21-4, enacted by Laws 1959, ch. 181, § 4; 1969, ch. 154, § 1; 1977, ch. 103, § 4.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

A capital stock building and loan association organized under the general corporation laws of this state cannot be a bank within the meaning of this section and is not exempt from the reporting requirements of 53-5-2 NMSA 1978. 1965 Op. Att'y Gen. No. 65-62.

A mutual building and loan association is not a bank within the meaning of this section and is not exempt from the reporting requirements of 53-5-2. 1965 Op. Att'y Gen. No. 65-62.

A financial corporation for the purposes of this act is a corporation treated as a financial corporation for the purposes of the Gross Receipts and Compensating Tax Act (7-9-1 to 7-9-81 NMSA 1978) and the former Banking and Financial Corporations Tax Act (7-6-1 to 7-6-9 NMSA 1978) (see the Corporate Income Tax Act, 7-2A-1 NMSA 1978 et seq.). If there is any doubt as to the status of a corporation, the corporation commission may require the corporation to submit proof that it is being treated as a financial corporation by the bureau of revenue (now taxation and revenue department). 1970 Op. Att'y Gen. No. 70-30 (rendered prior to 1977 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 14.

### **§ 53-5-5. Corporate reports; affirmation; penalty.**

A. All reports required to be filed with the commission pursuant to the Corporate Reports Act shall contain the following affirmation: "Under penalties of perjury, I declare and affirm that I have examined this report, including the accompanying schedules and statements, and that all statements contained therein are true and correct."

B. Any person who makes and subscribes any report required under the Corporate Reports Act that contains a false statement, which statement is known to be false by such person, is guilty of perjury and upon conviction shall be punished as provided for in the perjury statutes of this state.

History: 1978 Comp., § 53-5-5, enacted by Laws 1979, ch. 181, § 2.

Cross-references. - As to penalty for failure to file corporate reports, see 53-5-7 NMSA 1978.

Repeals and reenactments. - Laws 1979, ch. 181, § 2, repeals former 53-5-5 NMSA 1978, relating to supplemental reports to be filed with the commission, and enacts the above section.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

### **§ 53-5-6. Application for period of extension.**

A. Any corporation may upon application to the state corporation commission by the date upon which a report is required to be filed under the Corporate Reports Act, petition the commission for an extension of time in which to file the required report.

B. The state corporation commission may, for good cause shown, extend, in favor of a corporation subject to the Corporate Reports Act, for no more than a total of twelve months, the date on which any return required by the provisions of the Corporate Reports Act must be filed or the date on which the payment of any fee is required, but no extension shall prevent the accrual of interest as otherwise provided by law.

C. The state corporation commission shall, when an extension of time has been granted a corporation under the United States Internal Revenue Code for the time in which to file a return, grant the corporation the same extension of time to file the required return and to pay the required fees and tax, provided that a copy of the approved federal extension of time is attached to the corporation's annual report, and provided further that no such extension shall prevent the accrual of interest as otherwise provided by law.

D. Nothing contained in this section shall prevent the collection of any tax, penalty or interest due upon the failure of any corporation to submit the required report.

History: 1953 Comp., § 51-21-6, enacted by Laws 1959, ch. 181, § 6; 1961, ch. 197, § 7; 1977, ch. 103, § 6; 1979, ch. 181, § 3; 1989, ch. 102, § 1.

The 1989 amendment, effective January 1, 1990, substituted "by the date" for "not less than fifteen days prior to the date" in Subsection A and "state corporation commission" for "commission" throughout the section.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

Internal Revenue Code. - The United States Internal Revenue Code, referred to in Subsection C, appears as 26 U.S.C. § 1 et seq.

### **§ 53-5-7. Failure to file corporate reports; penalty.**

A. Every domestic corporation required to file an annual corporate report as provided in the Corporate Reports Act which fails to submit the report within the time prescribed for any reporting period shall incur a civil penalty of one hundred dollars (\$100) in addition to the fee for filing the report, such civil penalty to be paid upon filing the report. Sixty days after written notice of failure to file a report has been mailed to its registered agent and also to the principal office of the corporation as shown in the last corporate report filed with the commission, the corporation shall have its certificate of incorporation canceled by the commission without further proceedings unless the report is filed and all fees, franchise taxes, penalties and interest are paid within that sixty-day period.

B. Every foreign corporation required to file an annual corporate report as provided in the Corporate Reports Act which fails to submit the report within the time prescribed for any reporting period shall incur a civil penalty of one hundred dollars (\$100) in addition to the fee for filing the report, such civil penalty to be paid upon filing the report. Sixty days after written notice of failure to file a report has been mailed to its registered agent and also either to the principal office of the corporation in the state or country under the laws of which it is incorporated or to the principal office of the corporation as each address is shown in the last corporate report filed with the state corporation commission, the corporation shall have its certificate of authority to do business in this state canceled by the commission without further proceedings unless the report is filed and all fees, franchise taxes, penalties and interest are paid within that sixty-day period. Nothing in this section, however, shall be construed as authorizing a forfeiture of the right or privilege of engaging in interstate commerce.

C. Every domestic or foreign corporation not exempted from filing a supplemental report as provided in the Corporate Reports Act which fails to submit the required report within the time prescribed for any reporting period shall incur a civil penalty of one hundred dollars (\$100) in addition to the fee for filing the report, such civil penalty to be paid upon filing the report.

D. Any order of the commission may be appealed to the district court of Santa Fe county within sixty days of the date it was issued by the commission.

E. If any report required under the Corporate Reports Act is mailed, the state corporation commission shall allow three additional days when considering the postmark as the date of submission when determining if a filing is timely.

History: 1953 Comp., § 51-21-7, enacted by Laws 1959, ch. 181, § 7; 1961, ch 63, § 1; 1967, ch. 252, § 2; 1969, ch. 22, § 3; 1977, ch. 103, § 7; 1979, ch. 181, § 4; 1983, ch. 304, § 5; 1988, ch. 42, § 1.

Cross-references. - For provision authorizing service of process on secretary of state where corporation fails to file report, see 38-1-5 NMSA 1978.

The 1983 amendment substituted "for any reporting period" for "in any year" in the first sentences of Subsections A and B and in Subsection C, substituted "one hundred dollars (\$100)" for "twenty-five dollars (\$25.00)" in the first sentence of Subsection A, added the last sentence of Subsection A deleted "statutory" preceding "agent" near the beginning of the second sentence of Subsection B, substituted "corporate" for "annual" preceding "report" near the middle of the second sentence of Subsection B, inserted "state corporation" preceding "commission" near the middle of the second sentence of Subsection B, added "unless the report . . . sixty-day period." at the end of the second sentence of Subsection B, deleted the former first three sentences of Subsection D, which read: "Any domestic corporation which fails to submit a corporate report required by the Corporate Reports Act for a period of one year shall have its name and its records stricken from the files of the commission after proceedings held pursuant to the Corporate Reports Act. The commission shall issue a notice of dissolution setting a date for hearing. Service of process and notice of the proceeding shall be by certified mail to the last known agent for service of process of the corporation," and inserted "State Corporation" in Subsection E.

The 1988 amendment, effective May 18, 1988, corrected a misspelling in Subsection A and substituted "shall allow three additional days when considering the postmark" for "shall use the date of the postmark" in Subsection E.

Effective dates. - Laws 1979, ch. 181, § 5, makes the act effective on July 1, 1979.

Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

Generally. - The corporation department of the corporation commission may continue, under the Corporate Reports Act of 1959, its practice of forfeiting the right of corporations, both foreign and domestic, to transact business in this state if they fail to file their annual report by March 15. 1959-60 Op. Att'y Gen. No. 60-17.

Forfeitures not favored. - In view of the fact that forfeitures are not favored, as long as no detriment results to the public, statutes providing for forfeiture in case of an abuse of corporate powers or failure to carry out some statutory requirement, as the making and filing of annual reports, will be construed liberally. *State v. Sunset Ditch Co.*, 48 N.M. 17, 145 P.2d 219 (1944).

Effect of forfeiture on corporation's contracts. - In a proceeding in nature of a bill of review to vacate a decree of specific performance in favor of a corporation on the ground that corporation, by its failure to file required reports, had forfeited right to transact business when it negotiated for a lease, the petitioner was not entitled to aid of the court where the company's default was known to petitioner or could have been ascertained through reasonable diligence for presentation at time of the suit for specific

performance. *Ringle Dev. Corp. v. Town of Tome Land Grant*, 49 N.M. 192, 160 P.2d 441 (1945).

Law reviews. - For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act," see 6 *Nat. Resources J.* 617 (1966).

For article, "How to Stand Still Without Really Trying: A Critique of the New Mexico Administrative Procedures Act," see 10 *Nat. Resources J.* 840 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1885, 1887, 1888, 2130.  
19 C.J.S. Corporations § 1665.

### **§ 53-5-8. State corporation commission may furnish forms; release of information; penalty.**

A. The state corporation commission may, upon application, furnish the necessary blank forms used in the preparation of the annual corporate reports.

B. The commission shall provide pursuant to the provisions of the Public Records Act [14-3-1 to 14-3-16, 14-3-18 NMSA 1978] for the retention, storage and destruction of annual corporate reports filed with the commission.

C. Information obtained from reports filed pursuant to the provisions of the Corporate Reports Act shall be made available to interested persons during proper hours, except that data contained in Subsection B of Section 53-5-2 NMSA 1978 shall not be released unless in statistical form classified to prevent identification of particular corporations.

D. All reports required under the Corporate Reports Act may be used as evidence at any trial or hearing of the commission.

E. All reports required under the Corporate Reports Act shall be made available to the bureau of revenue [taxation and revenue department] upon written request and the bureau [department] shall be subject to the same restrictions upon revealing the information as are imposed by this section upon the commission.

F. Any other state agency or department or United States agency or department upon written request to the state corporation commission may examine reports filed with the commission upon a showing that the corporate reports sought to be examined are germane to an investigation being conducted by the petitioning agency or department, and any information revealed is subject to Subsection G of this section concerning the release of such information contrary to law by any person in the requesting agency or department.

G. Any person who releases information contrary to the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000) nor less than one hundred dollars (\$100) or by imprisonment in the county jail not more than ninety days nor less than thirty days or by both fine and imprisonment in the discretion of the judge.

History: 1953 Comp., § 51-21-8, enacted by Laws 1959, ch. 181, § 8; 1961, ch. 152, § 2; 1977, ch. 103, § 8.

Compiler's notes. - Following the amendment of 53-5-2 NMSA 1978 by Laws 1979, ch. 181, § 1, the reference to Subsection B of Section 53-5-2 NMSA 1978 in Subsection C of this section should be to Subsection A(2) of Section 53-5-2 NMSA 1978.

Bureau of revenue. - Pursuant to Laws 1977, ch. 249, § 5, the bureau of revenue, referred to in Subsection E, is abolished. All functions relating to taxation and revenue are now exercised by the taxation and revenue department. See Laws 1977, ch. 249, §§ 3 and 4.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

Examination of reports filed prior to effective date of act. - As to reports filed previous to the effective date of the Corporate Reports Act, the corporation commission has no power to permit the examination of such reports except under the circumstances set out in 1953 Comp., § 51-13-11 (repealed by Laws 1959, ch. 181, § 10), i.e., at a hearing of the commission or of any court under the provisions of the act. 1959-60 Op. Att'y Gen. No. 60-244.

Disclosing date of forfeiture for failure to pay franchise tax. - Analysis of 53-3-2 and 53-3-3 NMSA 1978 (Sections recompiled - see 53-3-1 NMSA 1978) reflects that disclosure of the date of a corporation's forfeiture would in no way circumvent nor violate that which is confidential. The date of forfeiture or reinstatement of a corporation's right to do business in New Mexico for failure to pay franchise tax is public information, may be disclosed to interested parties, and is not part of 53-5-2 B NMSA 1978 data. 1968 Op. Att'y Gen. No. 68-104.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 15.  
19 C.J.S. Corporations § 986.

### **§ 53-5-9. Dormant corporations; statement in lieu of annual [corporate] report.**

A. Whenever any corporation is no longer engaged in active business in this state or in carrying out the purposes of its incorporation, any two of its shareholders, directors or officers may unite in signing a statement to that effect; the statement shall be filed in lieu of the required corporate report. Upon the filing of this statement and the payment of all

fees, franchise taxes, penalties and interest, the state corporation commission shall be authorized to strike the name of the corporation from the list of active corporations in this state; but this action shall not be construed in any sense as a formal dissolution of the corporation nor shall the corporation be relieved thereby from any outstanding obligation. Any corporation in this class may be fully revived by the resumption of active business and the filing of a corporate report by the provision of this section.

B. Any corporation in this class may continue in this class by filing a statement of renewal every five years to the effect that it is not engaged in active business in this state nor carrying and [out] the purposes of its incorporation. Sixty days after written notice of failure to file a statement of renewal has been mailed to its registered agent and also to the principal office of the corporation as shown in the last corporate report filed with the commission, the corporation shall have its certificate of incorporation or authority cancelled by the commission without further proceedings unless the statement of renewal is filed and all fees are paid within that sixty-day period.

History: 1953 Comp., § 51-21-9, enacted by Laws 1959, ch. 181, § 9; 1983, ch. 304, § 6.

The 1983 amendment designated the former section as present Subsection A, added Subsection B, substituted "of its shareholders" for "stockholders" and deleted "thereof" following "officers," and substituted "corporate" for "annual" preceding "report" in the first sentence of Subsection A, inserted "and the payment of all fees, franchise taxes, penalties and interest" and inserted "state corporation" in the second sentence of Subsection A, and substituted "corporate" for "annual" in the last sentence of Subsection A.

Effective dates. - Laws 1959, ch. 181, § 11, makes the Corporate Reports Act effective on January 1, 1960.

Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - "Corporate" has been inserted in the catchline in brackets so as to agree with the text of this section, which refers to "corporate reports," not "annual reports."

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations § 1576.

## **Article 6**

### **Professional Corporations**

#### **§ 53-6-1. Purpose of act.**

The purpose of this act [53-6-1 to 53-6-13 NMSA 1978] is to provide for the incorporation of an individual, or group of individuals, to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

History: 1953 Comp., § 51-22-1, enacted by Laws 1963, ch. 16, § 1.

Provision of medical services by corporation controlled by non-physicians. - A corporation, organized and controlled by nonphysicians, may provide medical services to the general public through employed physicians, unless prohibited by statute or unless it exercises lay control of medical judgment or engages in lay exploitation of the medical profession in a manner prohibited by public policy. 1987 Op. Att'y Gen. No. 87-39.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 192 to 195; 18B Am. Jur. 2d Corporations §§ 2043, 2120.

Practice by attorneys and physicians as corporate entities or associations under professional service corporation statutes, 4 A.L.R.3d 383.  
18 C.J.S. Corporations § 47.

## **§ 53-6-2. Short title.**

This act [53-6-1 to 53-6-13 NMSA 1978] may be cited as the "Professional Corporation Act."

History: 1953 Comp., § 51-22-2, enacted by Laws 1963, ch. 16, § 2.

## **§ 53-6-3. Definitions.**

As used in this act [53-6-1 to 53-6-13 NMSA 1978]:

A. "professional service" means any type of personal service to the public which requires, as a condition precedent to the rendering of such service, the obtaining of a license or other legal authorization and which, prior to the passage of the Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978] and by reason of law, could not be performed by a corporation. The term includes, but is not necessarily limited to, the personal services rendered by certified public accountants, registered public

accountants, chiropractors, optometrists, dentists, osteopaths, podiatrists, architects, veterinarians, doctors of medicine, doctors of dentistry, physicians and surgeons, attorneys-at-law and life insurance agents; and

B. "professional corporation" means a corporation which is organized under the Professional Corporation Act for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who themselves are licensed or otherwise legally authorized within this state to render the same professional service as the corporation.

History: 1953 Comp., § 51-22-3, enacted by Laws 1963, ch. 16, § 3.

Effective dates. - Laws 1963, ch. 16, § 15, makes the Professional Corporation Act effective on July 1, 1963.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 192 to 195; 18B Am. Jur. 2d Corporations §§ 2043, 2120.  
18 C.J.S. Corporations § 47.

### **§ 53-6-4. Incorporation.**

One or more individuals, each of whom is licensed to render a professional service, may incorporate a professional corporation for pecuniary profit and become shareholders therein in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. The Business Corporation Act applies to professional corporations. If the provisions of the Business Corporation Act conflict with the provisions of the Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978], the provisions of the Professional Corporation Act shall prevail.

History: 1953 Comp., § 51-22-4, enacted by Laws 1969, ch. 245, § 1.

Repeals and reenactments. - Laws 1969, ch. 245, § 1, repeals 51-22-4, 1953 Comp., relating to incorporation of professional corporations, and enacts the above section.

Requirements for naming dentists' professional corporations. - Dentists may form a professional corporation for the practice of dentistry so long as the name of the corporation contains all of the names of the members of the professional corporation plus the words "professional corporation" or some other word or abbreviation of a word authorized by 53-6-6 NMSA 1978. 1969 Op. Att'y Gen. No. 69-63 (for provision requiring practice of dentistry under own name, see 61-5-16 NMSA 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 53, 54. Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251. 18 C.J.S. Corporations § 47.

### **§ 53-6-5. Purposes for which incorporated.**

A professional corporation may be organized only for the purpose of rendering one specific type of professional service and services ancillary thereto and shall not engage in any business other than rendering the professional service which it was organized to render and services ancillary thereto; provided, however, that a professional corporation may own real and personal property necessary or appropriate for rendering the type of professional service it was organized to render and may invest its funds in real estate, mortgages, stocks, bonds and any other type of investments.

History: 1953 Comp., § 51-22-5, enacted by Laws 1963, ch. 16, § 5.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 28, 30, 31; 18A Am. Jur. 2d Corporations §§ 192 to 198. Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251. 18 C.J.S. Corporations § 47.

### **§ 53-6-6. Corporate name.**

The corporate name of a professional corporation shall contain the words "limited," "chartered," "professional association" or "professional corporation" or shall contain an abbreviation of those words.

History: 1953 Comp., § 51-22-6, enacted by Laws 1969, ch. 245, § 2.

Repeals and reenactments. - Laws 1969, ch. 245, § 2, repeals 51-22-6, 1953 Comp., relating to corporate name, and enacts the above section.

Requirements for naming dentists' professional corporations. - See same catchline in notes to 53-6-4 NMSA 1978.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

## **§ 53-6-7. Professional services through officers, employees, and agents.**

A professional corporation shall render professional services only through its officers, employees and agents who are duly licensed or otherwise legally authorized to render such professional services; provided, however, this section shall not be interpreted to include in the term "employee," clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which the license is required.

History: 1953 Comp., § 51-22-7, enacted by Laws 1963, ch. 16, § 7.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251.

## **§ 53-6-8. Professional relationships preserved.**

The Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978] does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services; but the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] and as otherwise provided by law.

History: 1953 Comp., § 51-22-8, enacted by Laws 1969, ch. 245, § 3.

Repeals and reenactments. - Laws 1969, ch. 245, § 3, repeals 51-22-8, 1953 Comp., relating to preservation of professional relationships, and enacts the above section.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 141 to 302. What constitutes professional services within meaning of statute preserving individual liability of professional employees of professional corporation, association, or partnership, 31 A.L.R.4th 898.

Professional corporation stockholders' nonmalpractice liability, 50 A.L.R.4th 1276.  
7A C.J.S. Attorney and Client §§ 131, 132; 70 C.J.S. Physicians and Surgeons §§ 26, 27.

## **§ 53-6-9. Issuance and transfer of shares.**

Shares of stock of a professional corporation shall be issued and transferred only to persons who are duly licensed or legally authorized to render the professional service for which the corporation is organized, but such shares may be transferred:

A. by operation of law to persons or legal entities not so licensed or authorized, subject to the requirements of the Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978];

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

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

History: 1953 Comp., § 51-22-9, enacted by Laws 1969, ch. 245, § 4; 1983, ch. 304, § 7.

The 1983 amendment designated Subsection A and added Subsections B and C.

Repeals and reenactments. - Laws 1969, ch. 245, § 4, repealed former 51-22-9, 1953 Comp., relating to issuance of shares, and enacted a new 51-22-9, 1953 Comp.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 21; 18A Am. Jur. 2d §§ 381, 382, 681, 709, 733, 735.

Issues pertaining to ownership of professional corporation as affected by resignation from corporate practice by active shareholder, 32 A.L.R.4th 921.

18 C.J.S. Corporations § 210.

## **§ 53-6-10. Sale and transfer of shares.**

A. The articles of incorporation of any professional corporation shall provide for the purchase by the corporation, its shareholders, or any person duly licensed or authorized

to render the service for which the corporation is organized, of all shares of its stock:

(1) held by any person who shall have become disqualified to render the professional service for which he was licensed or authorized; or

(2) which devolve by operation of law upon any person or legal entity not licensed or authorized.

B. Any purchase of shares under Paragraph (1) of Subsection A shall be effected within a period of thirty days after establishment of the disqualification. Any purchase of shares under Paragraph (2) of Subsection A shall be effected within eight months from the date of devolution. Any shares held in violation of such provisions may be cancelled by action of the board of directors.

History: 1953 Comp., § 51-22-10, enacted by Laws 1969, ch. 245, § 5.

Repeals and reenactments. - Laws 1969, ch. 245, § 5, repeals 51-22-10, 1953 Comp., relating to sale and transfer of shares, and enacts the above section.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1802 to 1809, 1812 to 1814.

Construction and application of provision restricting sale or transfer of corporate stock, 2 A.L.R.2d 745.

Validity of restrictions on alienation or transfer of corporate stock, 61 A.L.R.2d 1318. 18 C.J.S. Corporations § 199.

### **§ 53-6-11. Contingent purchase or redemption price.**

If the articles of incorporation or the bylaws of a professional corporation fail to fix a price at which the corporation or its shareholders may purchase the shares of a deceased or disqualified shareholder, then the price for the shares shall be the book value of the shares as of the end of the month immediately preceding the death or disqualification of the shareholder.

History: 1953 Comp., § 51-22-11, enacted by Laws 1963, ch. 16, § 11; 1969, ch. 245, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1190, 1191.

18 C.J.S. Corporations § 403.

### **§ 53-6-12. Disqualification; dissolution.**

If any officer, shareholder, agent or employee of a professional corporation who has been rendering professional service to the public becomes legally disqualified to render the professional service within this state, or is elected to a public office that, pursuant to existing law, is a restriction or limitation upon rendering of a professional service, or accepts employment that, pursuant to existing law, places restriction or limitations upon his continued rendering of the professional service, he shall sever all employment with, and financial interest in, the professional corporation forthwith. A professional corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a professional corporation's failure to comply with this section is brought to the attention of the state corporation commission, the commission shall certify to the attorney general that fact, for appropriate action to dissolve the professional corporation.

History: 1953 Comp., § 51-22-12, enacted by Laws 1963, ch. 16, § 12.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2748, 2750 to 2752.

19 C.J.S. Corporations §§ 1638 to 1682.

### **§ 53-6-13. Mergers or consolidations.**

A professional corporation shall consolidate or merge only with another domestic professional corporation organized to render the same specific professional service.

History: 1953 Comp., § 51-22-13, enacted by Laws 1963, ch. 16, § 13; 1969, ch. 245, § 7.

Effective dates. - Laws 1963, ch. 16, § 15, makes the Professional Corporation Act effective on July 1, 1963.

Severability clauses. - Laws 1963, ch. 16, § 14, provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2503, 2507, 2509 to 2512, 2514, 2608 to 2615, 2618, 2621, 2623 to 2630.

Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251.

19 C.J.S. Corporations § 1621.

### **§ 53-6-14. Application to professional corporations.**

The provisions of the Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978] shall apply to all professional corporations chartered in New Mexico. Professional

corporations heretofore incorporated shall be required to file any amendments to their articles of incorporation necessary to conform to the requirements of the Professional Corporation Act within eight months from the effective date of this act. Any professional corporation which shall not have filed any necessary amendments within such eight-month period shall be involuntarily dissolved in conformity with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-22-14, enacted by Laws 1969, ch. 245, § 8.

Emergency clauses. - Laws 1969, ch. 245, § 9, makes the act effective immediately. Approved April 3, 1969.

Meaning of "this act". - The phrase "this act" at the end of the second sentence apparently means Laws 1969, ch. 245, which is compiled as 53-6-4, 53-6-6, 53-6-8, 53-6-9, 53-6-10, 53-6-11, 53-6-13 and 53-6-14 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Propriety, under state statutes or bar association or court rules, of formation of multistate law partnership or professional service corporation, 6 A.L.R.4th 1251.

## **Article 7**

### **Business Development Corporation**

§§ 53-7-1 to 53-7-17. Repealed.

Repeals. - Laws 1983, ch. 312, § 30, repeals 53-7-1 to 53-7-17 NMSA 1978, relating to development credit corporations, effective April 7, 1983. For present provisions, see 53-7-18 NMSA 1978 et seq.

### **§ 53-7-18. Short title.**

This act [53-7-18 to 53-7-46 NMSA 1978] may be cited as the "Business Development Corporation Act."

History: Laws 1983, ch. 312, § 1.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-19. Definitions.**

As used in the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA

1978]:

- A. "board of directors" means the board of directors of the corporation;
- B. "corporation" means the New Mexico business development corporation;
- C. "financial institution" means any banking corporation or institution, trust company, savings bank, cooperative bank, savings and loan association or other institution engaged primarily in lending or investing funds;
- D. "fund" means the business development corporation fund;
- E. "member" means any qualified financial institution that undertakes to lend money to the corporation upon its call and in accordance with the provisions of Section 16 [53-7-33 NMSA 1978] of the Business Development Corporation Act;
- F. "person" means a natural person, corporation, firm, association, trust, partnership, cooperative association, club, company, joint venture, syndicate or other legal entity; and
- G. "qualified financial institution" means any financial institution authorized to do business within the state.

History: Laws 1983, ch. 312, § 2.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-20. Business development corporation authorized.**

The "New Mexico business development corporation," a for-profit organization to provide development credit, is authorized to be organized and formed under the general corporation laws of this state and the provisions of the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978].

History: Laws 1983, ch. 312, § 3.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-21. Corporate purpose.**

A. The purpose of the corporation is to promote, stimulate, develop and advance business prosperity, employment and economic welfare in the state and among its

citizens; to encourage and assist through loans, investments or other business transactions in the location of new business and industry in this state and in rehabilitation and expansion of existing business and industry; to cooperate and act in conjunction with other organizations, public or private, in the promotion and advancement of industrial, commercial, agricultural and recreational developments in the state; and to provide financing for the promotion, development and conduct of all kinds of business activity in the state.

B. It is not intended that the corporation be a lender of last resort.

History: Laws 1983, ch. 312, § 4.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-22. Powers of corporation.**

The corporation shall have the powers conferred upon domestic corporations under the general corporation laws of this state unless otherwise specified in the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978] and shall also have the power to:

A. make contracts and incur liabilities for any of the purposes of the corporation; provide that the corporation shall not incur any secondary liability by way of guaranty or endorsement or in any other manner of the obligations of any person;

B. borrow money for any of the purposes of the corporation from any of its members or from any governmental agency that may legally loan money to the corporation;

C. issue bonds, debentures, notes or other evidences of indebtedness, whether secured or unsecured, and to secure the indebtedness by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof or interest therein, without securing stockholder or member approval; provided that no loan to the corporation from any of its members shall be secured in any manner unless all outstanding loans to the corporation are secured in the same manner, equally and ratably in proportion to the unpaid balance of the loans;

D. make loans to any person and establish and regulate the terms and conditions with respect to the loans and the charges for interest and service connected with the loans; however, no loan shall be made to any person which is in excess of thirty percent of the amount paid for issued stock of the corporation as reflected in the corporation's most recent financial statements;

E. purchase, receive, hold, lease or otherwise acquire, and sell, convey, transfer, lease or otherwise dispose of, real and personal property, together with such rights and

privileges as may be incidental and appurtenant to the property and the use of the property including but not limited to any real or personal property acquired by the corporation from time to time in the satisfaction of debts or enforcement of obligations;

F. acquire, construct, reconstruct, alter, repair, maintain, operate, sell, convey, transfer, lease or otherwise dispose of industrial plants or business establishments;

G. acquire, subscribe for, own, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the stock, shares, bonds, debentures, notes or other securities and evidences of interest in or indebtedness of any person and, while the owner or holder, exercise all the rights, powers and privileges of ownership;

H. mortgage, pledge or otherwise encumber any property, right or thing of value acquired pursuant to the provisions of this section as security for the payment of any part of the purchase price;

I. cooperate with and avail itself of the facilities of the commerce and industry department [economic development and tourism department] and other governmental agencies and cooperate with, assist and otherwise encourage communities and community organizations of the state in the promotion, assistance and development of their economic welfare; and

J. do all acts and things necessary or convenient to carry out the powers expressly granted in the Business Development Corporation Act.

History: Laws 1983, ch. 312, § 5.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Compiler's notes. - The commerce and industry department, referred to in Subsection I, was abolished by Laws 1983, ch. 297, § 33. The apparent intended reference is to the economic development and tourism department, created by Laws 1983, ch. 297, § 4.

### **§ 53-7-23. Requirements for incorporation.**

A. Prior to filing articles of incorporation, the incorporators shall obtain subscriptions for the purchase of shares of stock to provide for the initial capitalization of the corporation of a minimum of two million dollars (\$2,000,000). No subscriber shall subscribe for the purchase of more than ten percent of the initial issuance of stock by the corporation.

B. Prior to filing articles of incorporation, the incorporators shall obtain applications for membership with pledges for loans totaling a minimum of two million dollars (\$2,000,000).

C. The board of directors as listed in the articles of incorporation and thereafter elected shall be composed of an equal number of directors residing in each congressional district of the state.

History: Laws 1983, ch. 312, § 6.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-24. Authorization to commence business; initial directors' meeting.**

A. After issuance of the certificate of incorporation, the corporation is authorized to commence business, and stock, to the extent authorized by the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978], may from time to time be issued. The first meeting of the board of directors shall be called by a notice signed by a majority of the board of directors named in the articles of incorporation, stating the time, place and purpose of the meeting. A copy of the notice shall be mailed or delivered to each director at least five days before the day appointed for the meeting.

B. At the initial directors' meeting, the board of directors shall adopt bylaws, elect officers and transact such other business as may come before the meeting.

History: Laws 1983, ch. 312, § 7.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-25. First annual meeting.**

The first annual meeting of the stockholders and members shall be held within ninety days of incorporation, at which time a board of directors shall be elected pursuant to Subsection C of Section 6 [53-7-23 NMSA 1978] and Section 10 [53-7-27 NMSA 1978] of the Business Development Corporation Act, and bylaws for the corporation shall be reviewed and approved.

History: Laws 1983, ch. 312, § 8.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-26. Board of directors.**

The business and affairs of the corporation shall be managed and conducted by a board of directors which may exercise all the powers of the corporation except powers conferred by law or by the bylaws of the corporation upon the stockholders and members.

History: Laws 1983, ch. 312, § 9.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-27. Election of board of directors.**

The board of directors shall be elected at each annual meeting of the corporation or, if no annual meeting is held in any year at the time fixed by the bylaws, at a special meeting held in lieu of the annual meeting. At each annual or special meeting, the members shall elect two-thirds of the members of the board of directors and the stockholders shall elect the remaining members of the board of directors. The directors shall hold office until the next annual or special meeting of the corporation after their election and until their successors are elected and qualified, unless sooner removed in accordance with the provisions of the bylaws. Any vacancy in the office of a director elected by the members shall be filled by the directors elected by the members; any vacancy in the office of a director elected by the stockholders shall be filled by the directors elected by the stockholders.

History: Laws 1983, ch. 312, § 10.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-28. Limitation of liability.**

A. A director or officer shall not be personally liable to the corporation or its members for monetary damages for breach of fiduciary duty as a director or officer unless the breach or failure to perform constitutes willful misconduct or recklessness.

B. A director or officer shall not be personally liable for any damages resulting from:

(1) any negligent act or omission of an employee of the corporation;

(2) any negligent act or omission of another director or officer of the corporation; or

(3) any action taken as a director or officer or any failure to take any action as a director

or officer unless the director or officer has breached or failed to perform the duties of his office and the breach or failure to perform constitutes willful misconduct or recklessness.

History: 1978 Comp., § 53-7-28, enacted by Laws 1988, ch. 30, § 1.

Repeals and reenactments. - Laws 1988, ch. 30, § 1 repeals former 53-7-28 NMSA, as enacted by Laws 1983, ch. 312, § 11, and enacts the above section effective May 18, 1988. For provisions of former section, see the 1983 Replacement Pamphlet.

### **§ 53-7-29. Authorized capital stock; limitation on purchase of or subscription for certain stock or obligations.**

A. The initial authorized capital stock of the corporation shall consist of four million shares of common stock with a par value of one dollar (\$1.00) each, which shares shall be issued only on receipt by the corporation of cash in an amount not less than the par value of the common stock.

B. No stockholder is entitled as of right to purchase or subscribe for any unissued or treasury stock of the corporation, and no stockholder is entitled as of right to purchase or subscribe for any bonds, notes, certificates of indebtedness, debentures or other obligations convertible into stock of the corporation.

History: Laws 1983, ch. 312, § 12.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-30. Stockholders' exceptions from other laws.**

Notwithstanding any rule at common law, or any provision of any law or any provision in the charters of any corporation, agreements of association, articles of organization or trust indentures:

A. any person is authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of, the corporation and, while owner of the stock, to exercise all the rights, powers and privileges of ownership;

B. any qualified financial institution is authorized to become a member and to make loans to the corporation as provided in the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978]; and

C. any qualified financial institution which becomes a member is authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any

bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of, the corporation and, while owner of the stock, to exercise all the rights, powers and privileges of ownership, all without the approval of any regulatory authority of the state; provided that the amount of the capital stock of the corporation which may be acquired by any member pursuant to the authority granted in the Business Development Corporation Act shall not exceed ten percent of the loan limit of the member as provided in Section 16 [53-7-33 NMSA 1978] of that act. The amount of capital stock of the corporation which any member is authorized to acquire pursuant to the authority granted in that act is in addition to the amount of capital stock in other corporations which the member may otherwise be authorized to acquire.

History: Laws 1983, ch. 312, § 13.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-31. Application for membership.**

Any qualified financial institution may apply for membership in the corporation by making application to the board of directors on such form and in such manner as the board of directors may require, and membership shall become effective upon receipt of the application by the board of directors.

History: Laws 1983, ch. 312, § 14.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-32. Duration of membership.**

A. Membership in the corporation shall be for the duration of the corporation; provided that any member may withdraw after an initial period of membership of two years. Withdrawal from membership shall be given in writing to the corporation one year in advance of the intended withdrawal, and withdrawal shall be effective on the expiration date of the notice.

B. A member is not obligated to make any loans to the corporation pursuant to calls made subsequent to the withdrawal of the member.

History: Laws 1983, ch. 312, § 15.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-33. Loans to corporation by members.**

Each member shall make loans to the corporation when called upon by the corporation to do so and on such terms and other conditions approved by the board of directors, subject to the following conditions and limitations:

A. no loan to the corporation shall be made if immediately thereafter the total amount of all obligations of the corporation would exceed ten times the amount then paid in on the outstanding capital stock of the corporation;

B. the sum of the total outstanding balances on loans to the corporation made by a member and the amount paid by a member for the capital stock of the corporation at any time the member is called to make a loan shall not exceed:

(1) twenty percent of the sum of the outstanding balance on all loans to the corporation by all members, including any amounts validly called for loan but not yet loaned; or

(2) the member's loan limit. For purposes of the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978], "member's loan limit" means:

(a) for banks, two percent of the capital and surplus of the bank as shown on the bank's most recent quarterly statement of financial condition required by federal or state financial authorities as certified by an authorized officer of the bank;

(b) for savings and loan associations, provided the savings and loan association's general reserves, surplus and undivided profits aggregate a sum in excess of five percent of its withdrawal accounts, one-half of one percent of the savings and loan association's total outstanding loans or two hundred fifty thousand dollars (\$250,000), whichever is less, as shown on the savings and loan association's most recent quarterly statement of financial condition required by federal or state financial authorities as certified by an authorized officer of the savings and loan association; and

(c) for other financial institutions, such loan limits as may be approved by the board of directors;

C. subject to Subsection B of this section, each call made by the corporation shall be prorated among the members in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The adjusted loan limit of a member shall be the amount of the member's loan limit, as determined in Paragraph (2) of Subsection B of this section, reduced by the sum of the total outstanding balances of loans made by the member to the corporation and the investment in capital stock of the corporation held by the member at the time of the call;

D. all loans to the corporation by members shall be evidenced by bonds, debentures,

notes or other evidences of indebtedness of the corporation, which shall be freely transferable at all times and which shall bear interest at a rate of not less than one-quarter of one percent in excess of the rate of interest determined by the board of directors to be the prime rate prevailing at the date of issuance in the city of Albuquerque on unsecured commercial loans; and

E. all loan limits shall be established at the thousand dollar (\$1,000) amount nearest to the amount computed in accordance with the provisions of this section.

History: Laws 1983, ch. 312, § 16.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-34. Powers of stockholders and members; voting.**

A. The provisions of law set forth in Sections 53-13-1 through 53-13-13 NMSA 1978 shall be followed by the corporation in amending articles of incorporation, except as provided in the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978].

B. The stockholders and members shall have the following powers of the corporation:

(1) to determine the number of and elect directors pursuant to Section 10 [53-7-27 NMSA 1978] of the Business Development Corporation Act;

(2) to make, amend and repeal bylaws;

(3) to amend the articles of incorporation pursuant to Section 18 [53-7-35 NMSA 1978] of that act;

(4) to dissolve the corporation pursuant to Section 26 [25] [53-7-42 NMSA 1978] of that act; and

(5) to exercise such other of the powers of the corporation as may be conferred on the stockholders and the members by the bylaws.

C. As to all matters requiring action by the stockholders and the members, the stockholders and the members shall vote separately on the matter by classes, and, except as otherwise provided in the Business Development Corporation Act, such matters shall require a majority of the votes of the stockholders and a majority of the votes of the members.

D. Each stockholder shall have one vote, in person or by proxy, for each share of capital stock held by him. Each member shall have one vote, in person or by proxy, except that

any member having a loan limit of more than one thousand dollars (\$1,000) shall have one additional vote, in person or by proxy, for each additional one thousand dollars (\$1,000) which the member is authorized to have outstanding on loans to the corporation at any one time as determined under Paragraph (2) of Subsection B of Section 16 [53-7-33 NMSA 1978] of the Business Development Corporation Act.

History: Laws 1983, ch. 312, § 17.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Compiler's notes. - Paragraph (4) of Subsection B refers to § 26 of this act (codified as 53-7-43 NMSA 1978), but § 25 (codified as 53-7-42 NMSA 1978), relating to dissolution of corporations, is the apparent intended reference.

### **§ 53-7-35. Amendment of articles of incorporation.**

A. The articles of incorporation may be amended by the votes of the stockholders and the members, voting separately by classes, and the amendments shall require approval of two-thirds of the votes of the stockholders and two-thirds of the votes of the members; provided that no amendment of the articles of incorporation which is inconsistent with the general purposes expressed in the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978], which authorizes any additional class of capital stock to be issued or which eliminates or curtails the right of the director of the financial institutions division of the commerce and industry department [regulation and licensing department] to examine the corporation or the obligation of the corporation to make reports as provided in Section 22 [53-7-39 NMSA 1978] of the Business Development Corporation Act shall be made; and provided further that no amendment of the articles of incorporation which increases the obligation of a member to make loans to the corporation or makes any change in the principal amount, interest rate, maturity date or in the security or credit position of any outstanding loan of a member to the corporation shall be made without the consent of each member affected by the amendment.

B. Within thirty days after any meeting at which an amendment of the articles of incorporation has been adopted, the articles of amendment, setting forth the amendment and the adoption of it, shall be signed and sworn to by the president, the treasurer and a majority of the directors. The articles of amendment shall be submitted to the director of the financial institutions division, who shall examine the amendment. If the director of the financial institutions division finds that the amendment conforms to the requirements of the Business Development Corporation Act, he shall so certify and endorse his approval on the articles of amendment. The articles of amendment shall be filed in the office of the state corporation commission. No amendment shall take effect until the articles of amendment have been filed.

History: Laws 1983, ch. 312, § 18.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Commerce and industry department. - The commerce and industry department, referred to in Subsection A, was abolished by Laws 1983, ch. 297, § 33. The apparent intended reference is to the regulation and licensing department, which was created by Laws 1983, ch. 297, § 20.

### **§ 53-7-36. Legislative amendments; implementation.**

Within sixty days after the effective date of any legislative amendment to the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978], the stockholders and the members shall vote to modify the articles of incorporation pursuant to the amendment at a meeting duly called for that purpose. The purpose of the vote shall be solely to determine whether any member may be allowed to withdraw. If such amendment to the articles of incorporation is not approved by at least two-thirds of the votes of the stockholders and two-thirds of the votes of the members, any member voting against approval of the amendment to the articles of incorporation has the right to withdraw from membership. Within thirty days after a meeting at which such an amendment to the articles of incorporation has been voted on, a certificate signed and sworn to by the recording officer of the corporation, setting forth the action taken at the meeting with respect to the amendment and each member's vote, shall be filed in the office of the state corporation commission and the office of the financial institutions division [of the regulation and licensing department].

History: Laws 1983, ch. 312, § 19.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Financial institutions division. - The financial institutions division, referred to in the last sentence of this section, was placed under the regulation and licensing department by Laws 1983, ch. 297, § 20, which also created that department.

### **§ 53-7-37. Earned surplus.**

Each year the corporation shall set apart as earned surplus not less than ten percent of its net earnings for the preceding fiscal year until the surplus equals in value ten percent of the corporation's then-outstanding loans. Whenever the amount of surplus established pursuant to this section becomes impaired, it shall be built up again to the required amount in the manner provided for its original accumulation. Net earnings and surplus shall be determined by the board of directors after providing for such reserves

as the directors deem desirable, and the directors' determination made in good faith is conclusive on all persons.

History: Laws 1983, ch. 312, § 20.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-38. Depositories for funds.**

A. The corporation shall not deposit any of its funds in any depository institution unless the institution has been designated as a depository by a vote of a majority of the directors present at an authorized meeting of the board of directors. Any director who is an officer or director of the depository considered for designation shall not participate in the vote on the question.

B. The corporation shall not receive money on deposit.

History: Laws 1983, ch. 312, § 21.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-39. Annual report; other information.**

The corporation shall be subject to the examination of the director of the financial institutions division [of the regulation and licensing department]. The corporation shall make reports of its condition not less than annually to the director of the financial institutions division and to the state corporation commission, and the corporation shall furnish such other information as may from time to time be required by the director of the financial institutions division.

History: Laws 1983, ch. 312, § 22.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Financial institutions division. - The financial institutions division, referred to throughout this section, was placed under the regulation and licensing department by Laws 1983, ch. 297, § 20, which also created that department.

### **§ 53-7-40. Exemption from application of other laws.**

The corporation is not subject to the provisions of the New Mexico Securities Act of 1986 [58-13B-1 to 58-13B-56 NMSA 1978] and is exempt from taxation under the Corporate Income and Franchise Tax Act [Chapter 7, Article 2A NMSA 1978].

History: Laws 1983, ch. 312, § 23; 1988, ch. 30, § 2.

The 1988 amendment, effective May 18, 1988, substituted "New Mexico Securities Act of 1986" for the "Securities Act of New Mexico" and inserted "and Franchise" after "Corporate Income."

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-41. Duration of corporation.**

The period of duration of the corporation shall be in perpetuity, subject, however, to the right of the stockholders and the members to dissolve the corporation as provided in Section 26 [25] [53-7-42 NMSA 1978] of the Business Development Corporation Act.

History: Laws 1983, ch. 312, § 24.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Compiler's notes. - This section refers to § 26 of this act (codified as 53-7-43 NMSA 1978), but § 25 (codified as 53-7-42 NMSA 1978), relating to dissolution of corporations, is the apparent intended reference.

### **§ 53-7-42. Dissolution of corporation.**

The corporation may, upon the affirmative vote of two-thirds of the votes of the stockholders and two-thirds of the votes of the members, petition for its dissolution in accordance with the provisions of the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978]. Upon dissolution of the corporation, none of the corporation's assets shall be distributed to the stockholders until all sums due the members of the corporation as creditors have been paid in full.

History: Laws 1983, ch. 312, § 25.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-43. Voidability of act.**

If no corporation is formed under the provisions of the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978] within three years from the effective date of that act, that act shall be void.

History: Laws 1983, ch. 312, § 26.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-44. Credit of state not pledged.**

Under no circumstances is the credit of the state pledged or obligated by the provisions of the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978].

History: Laws 1983, ch. 312, § 27.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

### **§ 53-7-45. Fund created; transfer; state purchase of bonds and stocks.**

A. The state is authorized to purchase bonds and stocks from the corporation to be secured by the assets of the corporation.

B. There is created the "business development corporation fund" which shall be the successor to the development credit corporation fund. All money in the development credit corporation fund shall be transferred by the state treasurer to the business development corporation fund. The state treasurer shall use this fund to purchase bonds and stocks of the corporation.

C. Bonds of the corporation shall be direct general obligations of the corporation secured by a first lien on the assets of the corporation of equal rank with the first lien afforded members as security for their loans to the corporation. The obligations of the corporation purchased as authorized by the Business Development Corporation Act [53-7-18 to 53-7-46 NMSA 1978], bearing a maturity date not to exceed ten years and offered at a price of not less than one-half of one percent in excess of the current rate for obligations of the United States bearing similar maturities, shall be purchased directly from the corporation. Prior to the purchase of any obligations of the corporation, there shall be furnished to the state treasurer without cost to him the opinion of legal counsel acceptable to the state treasurer approving the validity of the issue and reciting that the conditions imposed by this section have been met.

D. The state may purchase bonds issued by the corporation only out of funds available in the fund.

E. The state may purchase stock of the corporation. Stocks purchased by the state shall be preferred stock and shall have all rights and dividend preferences characteristic of such stock. The state treasurer may consider the following factors when assessing purchase of the stock:

- (1) rate dividends;
- (2) redeemability of shares;
- (3) redemption price;
- (4) terms and conditions of redemption;
- (5) amount payable on shares upon liquidation;
- (6) sinking fund provisions;
- (7) terms and conditions of convertible shares; and
- (8) voting rights of preferred stockholders.

F. The state is authorized to convert bonds purchased from the corporation to preferred stock of the corporation.

History: Laws 1983, ch. 312, § 28; 1988, ch. 9, § 1.

The 1988 amendment, effective May 18, 1988, added "and stocks" following "bonds" in the catchline and in Subsections A and B and added Subsections E and F.

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Compiler's notes. - Development credit corporations and the development credit corporation fund were abolished by Laws 1983, ch. 312, § 30.

### **§ 53-7-46. Investment of fund.**

A. Money in the business development corporation fund in excess of the amount necessary for purchase of bonds from the corporation may be invested by the state treasurer in accordance with provisions of law regulating the investment of public funds.

B. All investments under this section may be sold at the prevailing market price.

History: Laws 1983, ch. 312, § 29; 1989, ch. 324, § 30.

The 1989 amendment, effective April 7, 1989, in Subsection A, inserted "business development corporation" and, in Subsection B, deleted the former second sentence, which read "Income from these investments shall be credited to the fund".

Emergency clauses. - Laws 1983, ch. 312, § 32, makes the act effective immediately. Approved April 7, 1983.

Severability clauses. - Laws 1983, ch. 312, § 31, provides for the severability of the act if any part or application thereof is held invalid.

## **Article 8**

### **Nonprofit Corporations**

#### **§ 53-8-1. Short title.**

Article 8 of Chapter 53 NMSA 1978 may be cited as the "Nonprofit Corporation Act."

History: 1953 Comp., § 51-14-43, enacted by Laws 1975, ch. 217, § 1; 1977, ch. 178, § 1.

Cross-references. - As to exemption from franchise tax, see 53-8-28 NMSA 1978. For constitutional provision creating tax exempt property, see N.M. Const., art. VIII, § 3. As to exemptions from income tax, see 7-2-4 NMSA 1978.

Law reviews. - For article, "The Profitable Nonprofit Corporation: Business Activity and Tax Exemption Under Section 501(c)(3) of I.R.C.," see 1 N.M.L. Rev. 563 (1971).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15 Am. Jur. 2d Charities § 180; 18 Am. Jur. 2d Corporations § 32.  
7 C.J.S. Associations § 54.

#### **§ 53-8-2. Definitions.**

As used in the Nonprofit Corporation Act [this article], unless the context otherwise requires, the term:

A. "corporation" or "domestic corporation" means a nonprofit corporation subject to the

provisions of the Nonprofit Corporation Act, except a foreign corporation;

B. "foreign corporation" means a nonprofit corporation organized under laws other than the laws of New Mexico for a purpose or purposes for which a corporation may be organized under the Nonprofit Corporation Act;

C. "nonprofit corporation" means a corporation no part of the income or profit of which is distributable to its members, directors or officers;

D. "articles of incorporation" means the original or restated articles of incorporation or articles of consolidation and all amendments thereto, including articles of merger;

E. "bylaws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated;

F. "member" means one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws;

G. "board of directors" means the group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated;

H. "insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its affairs;

I. "commission" or "corporation commission" means the state corporation commission or its delegate;

J. "address" means:

(1) the mailing address and the street address, if within a municipality; or

(2) the mailing address and a rural route number and box number, if any, or the geographical location, using well-known landmarks, if outside a municipality;

K. "duplicate original" means a document which is signed or executed in duplicate;

L. "delivery" means:

(1) if personally served, the date documentation is received by the commission's corporation department; and

(2) if mailed to the commission, the date of the postmark plus three days, upon proof thereof by the party delivering the documentation; and

M. "person" includes individuals, partnerships, corporations and other associations.

History: 1953 Comp., § 51-14-44, enacted by Laws 1975, ch. 217, § 2; 1977, ch. 178, § 2; 1983, ch. 304, § 8; 1989, ch. 294, § 1.

The 1983 amendment added "or its delegate" at the end of Subsection I and added Subsection L.

The 1989 amendment, effective January 1, 1990, in Subsection J, added the paragraph designations, deleted "a recitation of" at the end of the introductory language, in Paragraph (1) deleted "or post office box number" following "mailing address" and "a description of" from the end of the paragraph, and, in Paragraph (2), inserted "the mailing address and a rural route number and box number, if any, or" and "using well-known landmarks"; and added Subsection M.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-3. Applicability.**

A. The provisions of the Nonprofit Corporation Act [this article] relating to domestic corporations apply to:

(1) all corporations organized under that act; and

(2) all nonprofit corporations organized under any acts repealed by the Nonprofit Corporation Act, for a purpose or purposes for which a corporation might be organized under that act.

B. The provisions of the Nonprofit Corporation Act relating to foreign corporations apply to all foreign nonprofit corporations conducting affairs in New Mexico for a purpose or purposes for which a corporation might be organized under that act.

History: 1953 Comp., § 51-14-45, enacted by Laws 1975, ch. 217, § 3.

Acts repealed by Nonprofit Corporation Act. - Laws 1975, ch. 217, § 98, repeals 51-14-20 to 51-14-42, 1953 Comp., effective July 1, 1976.

### **§ 53-8-4. Purposes.**

Corporations may be organized under the Nonprofit Corporation Act [this article] for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural;

horticultural; animal husbandry; and professional, commercial, industrial or trade association.

History: 1953 Comp., § 51-14-46, enacted by Laws 1975, ch. 217, § 4.

Prepaid group visual care program. - It would be legal to organize a nonprofit organization for a prepaid group visual care program under the laws of the state of New Mexico, despite the fact that no specific authorization has as yet been granted by way of legislative enactment. 1959-60 Op. Att'y Gen. No. 59-156 (rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15 Am. Jur. 2d Charities § 181; 18A Am. Jur. 2d Corporations §§ 194, 195.

Implied power of corporation belonging to one of the three classes, religious, charitable or educational, to promote, or to accept gifts for, objects which more appropriately pertain to the purposes of those in one of the other classes, 121 A.L.R. 1526.

Nonprofit purposes and character which warrant creation of nonprofit corporation, 16 A.L.R.2d 1345.

10 C.J.S. Beneficial Associations § 8; 18 C.J.S. Corporations § 47.

### **§ 53-8-5. General powers.**

Each corporation shall have power to:

A. have perpetual succession by its corporate name unless a limited period of duration is stated in its article of incorporation;

B. sue and be sued, complain and defend in its corporate name;

C. have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in other manner reproduced, but failure to have or to affix a corporate seal does not affect the validity of any instrument or any action taken in pursuance thereof or in reliance thereon;

D. purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated;

E. sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

F. lend money to its directors, officers and employees and otherwise assist them;

G. purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign

corporations, whether for profit or not for profit, associations, partnerships, limited partnerships or individuals, or direct or indirect obligations of the United States, or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

H. make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income;

I. lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested;

J. conduct its affairs, carry on its operations, and have offices and exercise the powers granted by the Nonprofit Corporation Act [this article] in any state, territory, district or possession of the United States, or in any foreign country;

K. elect or appoint directors and define their duties and fix their compensation, if any;

L. elect or appoint officers and agents of the corporation, who may be directors or members, and define their duties and fix their compensation;

M. make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of New Mexico, for the administration and regulation of the affairs of the corporation;

N. unless otherwise provided in the articles of incorporation, make donations for the public welfare or for charitable, scientific or educational purposes; and in time of war to make donations in aid of war activities;

O. pay pensions and establish pension plans, pension trusts, profit-sharing plans and other incentive plans for any or all of its directors, officers and employees;

P. cease its corporate activities and surrender its corporate franchise; and

Q. have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

History: 1953 Comp., § 51-14-47, enacted by Laws 1975, ch. 217, § 5.

Class actions. - A corporation's right to sue for relief as an entity and its right to sue for recovery for its individual members is not identical. *O'Hare v. Valley Utils., Inc.*, 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Leases. - The eastern New Mexico state fair would have the authority to lease the property owned by it to anyone and on such terms and conditions as it deems proper, provided that its articles of incorporation do not preclude this, and provided further that the terms of such lease provide a return reasonably in line with the value of the property leased and do not amount to a gift. 1957-58 Op. Att'y Gen. No. 57-256 (rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1990, 1991.

Power and capacity of unincorporated association, lodge, society, or club to convey, transfer or encumber association property, 15 A.L.R.2d 1451.

Enforceability of subscription under conditional charitable pledge, 97 A.L.R.3d 1054.

Modern status: validity and effect of mortmain statutes, 6 A.L.R.4th 603.

19 C.J.S. Corporations § 933.

### **§ 53-8-6. Defense of ultra vires.**

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do the act or to make or receive the conveyance or transfer, but such lack of capacity or power may be asserted:

A. in a proceeding by a member or a director against the corporation to enjoin the doing or continuation of unauthorized acts, or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of the contract, and in so doing may allow to the corporation or the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of the contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained; or

B. in a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through members in a representative [representative] suit, against the officers or directors of the corporation for exceeding their authority.

History: 1953 Comp., § 51-14-48, enacted by Laws 1975, ch. 217, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1283 to 1340, 1990 to 2072.

18 C.J.S. Corporations § 562; 19 C.J.S. Corporations §§ 970 to 980, 1010, 1112 to 1117, 1130 to 1133, 1262, 1331.

## **§ 53-8-7. Corporate name.**

The corporate name:

A. shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation; and

B. shall not be the same as, or confusingly similar to, the name of any corporation, whether for profit or not for profit, existing under the laws of New Mexico, or any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in New Mexico, or a corporate name reserved or registered as permitted by the laws of New Mexico.

History: 1953 Comp., § 51-14-49, enacted by Laws 1975, ch. 217, § 7.

Similar name. - Fraternal organization was restrained from holding itself out as the Masonic Grand Lodge, Colored for the jurisdiction of New Mexico and use of name "Free and Accepted Masons of New Mexico" and "A. F. and A. M. (Colored)" of New Mexico, which rendered it strikingly similar to other grand lodges, resulting in confusion and tending to deceive the public. *Prince Hall Grand Lodge v. Most Worshipful King Solomon Grand Lodge*, 62 N.M. 255, 308 P.2d 581 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 273, 283. Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 A.L.R.3d 277. 18 C.J.S. Corporations §§ 164 to 174.

### **§ 53-8-7.1. Reserved name.**

A. The exclusive right to the use of a corporate name may be reserved by:

(1) any person intending to organize a corporation under the Nonprofit Corporation Act [this article];

(2) any domestic corporation intending to change its name;

(3) any foreign corporation intending to make application for a certificate of authority to conduct affairs in this state;

(4) any foreign corporation authorized to conduct affairs in this state and intending to change its name; or

(5) any person intending to organize a foreign corporation and intending to have such

corporation make application for a certificate of authority to conduct affairs in this state.

B. The reservation shall be made by filing with the commission an application to reserve a specified corporate name, executed by the applicant. If the commission finds that the name is available for corporate use, it shall reserve the name for the exclusive use of the applicant for a period of one hundred twenty days.

C. The right to the exclusive use of a specified corporate name so reserved may be transferred to any other person or corporation by filing in the office of the commission a notice of transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee.

History: 1978 Comp., § 53-8-7.1, enacted by Laws 1983, ch. 304, § 9.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-8. Registered office and registered agent.**

Each corporation shall have and continuously maintain in New Mexico:

A. a registered office which may be, but need not be, the same as its principal office; and

B. a registered agent, which agent may be either an individual resident in New Mexico whose business office is identical with such registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in New Mexico, having an office identical with such registered office.

History: 1953 Comp., § 51-14-50, enacted by Laws 1975, ch. 217, § 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations §§ 1296 to 1298.

### **§ 53-8-9. Change of registered office or registered agent.**

A. A corporation may change its registered office or change its registered agent, or both, upon filing in the office of the corporation commission a statement setting forth:

(1) the name of the corporation;

(2) the address of its then registered office;

(3) if the address of its registered office be changed, the address to which the registered office is to be changed;

(4) the name of its then registered agent;

(5) if its registered agent be changed:

(a) the name of its successor registered agent; and

(b) an affidavit executed by the successor registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the successor registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation;

(6) that the address of its registered office and the address of the office of its registered agent, as changed, will be identical; and

(7) that such change was authorized by resolution duly adopted by its board of directors.

B. The statement under the provisions of Subsection A of this section shall be executed by the corporation by its president or a vice president and delivered to the corporation commission. If the corporation commission finds that the statement conforms to the provisions of the Nonprofit Corporation Act [this article], it shall file the statement in the office of the corporation commission, and upon such filing, the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.

C. Any registered agent of a corporation may resign as agent upon filing a written notice thereof, executed in duplicate, with the corporation commission, which shall forthwith mail a copy thereof to the corporation in care of an officer, who is not the resigning registered agent, at the address of the officer as shown by the most recent annual report of the corporation. The appointment of the agent shall terminate upon the expiration of thirty days after receipt of the notice by the corporation commission.

History: 1953 Comp., § 51-14-51, enacted by Laws 1975, ch. 217, § 9; 1977, ch. 178, § 3.

### **§ 53-8-10. Service of process on corporation.**

The registered agent appointed by a corporation shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served. Nothing in this section limits or affects the right to

serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

History: 1953 Comp., § 51-14-52, enacted by Laws 1975, ch. 217, § 10.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2192 to 2214.

19 C.J.S. Corporations § 1305.

### **§ 53-8-11. Members.**

A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or the bylaws. If the corporation has no members, that fact shall be set forth in the articles of incorporation or the bylaws. A corporation may issue certificates evidencing membership therein.

History: 1953 Comp., § 51-14-53, enacted by Laws 1975, ch. 217, § 11.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of member of nonprofit association or corporation to possession, inspection, or use of membership list, 37 A.L.R.4th 1206.

### **§ 53-8-12. Bylaws.**

A. The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the articles of incorporation or the bylaws. The bylaws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.

B. The initial bylaws and any subsequent bylaws whether by amendment, repeal or new adoption shall be executed by the corporation's chief officer and by its secretary or assistant secretary and filed with the commission. Such bylaws shall be void until filed with the commission.

History: 1953 Comp., § 51-14-54, enacted by Laws 1975, ch. 217, § 12; 1977, ch. 178, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 310 to 332.

18 C.J.S. Corporations §§ 179 to 190.

### **§ 53-8-13. Meetings of members.**

A. Meetings of members shall be held at such place, either within or without New Mexico as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation in New Mexico.

B. An annual meeting of the members shall be held at such time as may be provided in the bylaws. If the annual meeting is not held within any thirteen-month period, the district court may, on the application of any member, order a meeting to be held. However, failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation.

C. Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the articles of incorporation or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having one-twentieth of the votes entitled to be cast at such meeting.

History: 1953 Comp., § 51-14-55, enacted by Laws 1975, ch. 217, § 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 948 to 962; 18B Am. Jur. 2d Corporations §§ 1365 to 1367, 1436.  
18 C.J.S. Corporations §§ 539 to 543.

### **§ 53-8-14. Notice of members' meetings; waiver.**

A. Unless otherwise provided in the articles of incorporation or the bylaws, written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid.

B. Attendance at any meeting by a member shall constitute a waiver of notice of the meeting, except where a member attends a meeting for the expressed purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

History: 1953 Comp., § 51-14-56, enacted by Laws 1975, ch. 217, § 14.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 963 to 985; 18B Am. Jur. 2d Corporations §§ 1368 to 1370, 1436.  
18 C.J.S. Corporations § 544.

### **§ 53-8-15. Voting.**

A. The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

B. A member entitled to vote may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

C. The articles of incorporation or the bylaws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or by distributing such votes on the same principle among any number of candidates.

D. If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power.

History: 1953 Comp., § 51-14-57, enacted by Laws 1975, ch. 217, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 1004, 1006; 18B Am. Jur. 2d Corporations § 1379.  
18 C.J.S. Corporations § 553.

### **§ 53-8-16. Quorum.**

The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding one-tenth of the votes entitled to be cast on the matter to be voted upon represented in person or by proxy shall constitute a quorum. A majority of the votes entitled to be cast on a matter to be voted upon by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption thereof unless a greater proportion is required by the Nonprofit Corporation Act [this article], the articles of incorporation or the bylaws.

History: 1953 Comp., § 51-14-58, enacted by Laws 1975, ch. 217, § 16.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 993 to 998; 18B Am. Jur. 2d Corporations § 1372.  
18 C.J.S. Corporations § 546.

### **§ 53-8-17. Board of directors.**

The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of New Mexico or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

History: 1953 Comp., § 51-14-59, enacted by Laws 1975, ch. 217, § 17.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2259 to 2271.  
19 C.J.S. Corporations § 726.

### **§ 53-8-18. Number and election of directors.**

A. The number of directors of a corporation shall be not less than three. Subject to such limitation, the number of directors shall be fixed by the bylaws, except as to the number of the first board of directors which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws, unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment of the articles of incorporation. No decrease in number shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation.

B. The directors constituting the first board of directors shall be named in the articles of incorporation and shall hold office until the first annual election of directors or for such other period as may be specified in the articles of incorporation or the bylaws. Thereafter, directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the bylaws. In the absence of a provision fixing the term of office, the term of office of a director shall be one year.

C. Directors may be divided into classes and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he is elected or appointed and until his successor shall have been elected or appointed and qualified.

D. A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation or the bylaws.

History: 1953 Comp., § 51-14-60, enacted by Laws 1975, ch. 217, § 18.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 1341.  
19 C.J.S. Corporations §§ 716 to 720.

### **§ 53-8-19. Vacancy.**

A. Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors, unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control.

B. A director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office.

C. Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors for a term of office continuing only until the next election of directors.

History: 1953 Comp., § 51-14-61, enacted by Laws 1975, ch. 217, § 19.

### **§ 53-8-20. Quorum of directors.**

A. A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business, unless otherwise provided in the articles of incorporation or the bylaws; but in no event shall a quorum consist of less than one-third of the number of directors so fixed or stated. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the Nonprofit Corporation Act [this article], the articles of incorporation or the bylaws.

B. A quorum, once attained at a meeting, shall be deemed to continue until adjournment, notwithstanding the voluntary withdrawal of enough directors to leave less than a quorum.

History: 1953 Comp., § 51-14-62, enacted by Laws 1975, ch. 217, § 20.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1470 to 1474.  
19 C.J.S. Corporations § 749.

## **§ 53-8-21. Committees.**

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors. The committees, to the extent provided in the resolution, in the articles of incorporation or in the bylaws of the corporation, shall have and exercise all the authority of the board of directors, except that no committee shall have the authority of the board of directors in reference to amending, altering or repealing the bylaws; electing, appointing or removing any member of any committee or any director or officer of the corporation; amending the articles of incorporation, restating articles of incorporation, adopting a plan of merger or adopting a plan of consolidation with another corporation; authorizing the sale, lease, exchange or mortgage of all or substantially all of the property and assets of the corporation; authorizing the voluntary dissolution of the corporation or revoking proceedings therefor; adopting a plan for the distribution of the assets of the corporation; or amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by the committee. The designation and appointment of any committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director, of any responsibility imposed upon it or him by law.

History: 1953 Comp., § 51-14-63, enacted by Laws 1975, ch. 217, § 21.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1508 to 1518.

19 C.J.S. Corporations §§ 758 to 760.

## **§ 53-8-22. Directors' meetings.**

Meetings of the board of directors, regular or special, may be held either within or without New Mexico and upon such notice as the bylaws may prescribe. Attendance of a director at any meeting shall constitute a waiver of notice of the meeting except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of the meeting unless required by the bylaws. Except as otherwise restricted by the articles of incorporation or bylaws, members of the board of directors or any committee designated thereby may participate in a meeting of the board or committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time and participation by such means shall constitute presence in person at a meeting.

History: 1953 Comp., § 51-14-64, enacted by Laws 1975, ch. 217, § 22; 1983, ch. 304, § 10.

The 1983 amendment added "unless required by the bylaws" at the end of the third sentence and added the last sentence.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 1475. 19 C.J.S. Corporations §§ 744 to 751.

### **§ 53-8-23. Officers.**

A. Every corporation organized under the Nonprofit Corporation Act [this article] shall have officers, with titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws, and as many officers as may be necessary to enable the corporation to sign instruments required under the Nonprofit Corporation Act. One of the officers shall have the duty to record the proceedings of the meetings of the members and directors in a book to be kept for that purpose. In the absence of any provision, all officers shall be elected or appointed annually by the board of directors. If the bylaws so provide, any two or more offices may be held by the same person.

B. The articles of incorporation or the bylaws may provide that any one or more officers of the corporation shall be ex officio members of the board of directors.

C. The officers of a corporation may be designated by such additional titles as may be provided in the articles of incorporation or the bylaws.

History: 1953 Comp., § 51-14-65, enacted by Laws 1975, ch. 217, § 23; 1989, ch. 294, § 2.

The 1989 amendment, effective January 1, 1990, in Subsection A, substituted the present first two sentences for the former first sentence, which read "The officers of a corporation shall consist of a president, one or more vice presidents, a secretary, a treasurer and such other officers and assistant officers as may be deemed necessary, each of whom shall be elected or appointed at such time and in such manner and for such terms not exceeding three years as may be prescribed in the article of incorporation or the bylaws", and deleted "except the offices of president and secretary" from the end of the last sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 1341. 19 C.J.S. Corporations § 715.

## **§ 53-8-24. Removal of officers.**

Any officer elected or appointed may be removed by the persons authorized to elect or appoint the officer whenever, in their judgment, the best interest of the corporation will be served thereby. The removal of an officer shall be without prejudice to the contract rights, if any, of the officer so removed. Election or appointment of an officer or agent shall not of itself create contract rights.

History: 1953 Comp., § 51-14-66, enacted by Laws 1975, ch. 217, § 24.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations § 1341.  
19 C.J.S. Corporations § 715.

## **§ 53-8-25. Liability.**

The directors, officers, employees and members of the corporation shall not be personally liable for the corporation's obligations.

History: 1953 Comp., § 51-14-67, enacted by Laws 1975, ch. 217, § 25.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1684 to 1720.

Personal liability of member of voluntary association not organized for personal profit on contract with third person, 7 A.L.R. 222; 41 A.L.R. 754.

### **§ 53-8-25.1. Duties of directors.**

A director shall perform his duties as a director including his duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director believes to be in or not opposed to the best interests of the corporation and with such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties, a director shall be entitled to rely on factual information, opinions, reports or statements including financial statements and other financial data in each case prepared or presented by:

A. one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

B. counsel, public accountants or other persons as to matters which the director reasonably believes to be within such persons' professional or expert competence; or

C. a committee of the board upon which the director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws as to matters

within its designated authority, which committee the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

History: 1978 Comp., § 53-8-25.1, enacted by Laws 1987, ch. 238, § 5.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

### **§ 53-8-25.2. Liability of directors.**

No director of the corporation shall be personally liable to the corporation or its members for monetary damages for breach of fiduciary duty as a director unless:

A. the director has breached or failed to perform the duties of the director's office in compliance with Section 53-8-25.1 NMSA 1978; and

B. the breach or failure to perform constitutes willful misconduct or recklessness.

The provisions of this section shall, however, only eliminate the liability of a director for action taken as a director or any failure to take action as a director at meetings of the board of directors or of a committee of the board of directors or by virtue of action of the directors without a meeting pursuant to Section 53-8-97 NMSA 1978, on or after the date when the provisions of this section become effective.

History: 1978 Comp., § 53-8-25.2, enacted by Laws 1987, ch. 238, § 6.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

Compiler's notes. - The phrase "the date when the provisions of this section become effective", in the last sentence, refers to April 9, 1987, the effective date of Laws 1987, Chapter 238.

### **§ 53-8-25.3. Nonprofit corporations; boards of directors; liability; immunity.**

A. Except as otherwise provided in this section, no member of a board of directors of a nonprofit corporation as defined in the Nonprofit Corporation Act [this article] shall be held personally liable for any damages resulting from:

(1) any negligent act or omission of an employee of that nonprofit corporation;

(2) any negligent act or omission of another director of that nonprofit corporation; or

(3) any action taken as a director or any failure to take any action as a director unless:

(a) the director has breached or failed to perform the duties of the director's office; and

(b) the breach or failure to perform constitutes willful misconduct or recklessness.

B. The immunity provided in Subsection A of this section shall not extend to acts or omissions of directors of nonprofit corporations that constitute willful misconduct or recklessness personal to the director. The immunity is limited to actions taken as a director at meetings of the board of directors or a committee of the board of directors or by action of the directors without a meeting pursuant to Section 53-8-97 NMSA 1978.

C. A nonprofit corporation shall not transfer assets in order to avoid claims against corporate assets resulting from a judgment against the corporation. If a director votes to do so, the immunity provided by this section shall have no force or effect as to that director.

History: Laws 1987, ch. 237, § 1.

Cross-references. - As to liability of directors of nonprofit corporations, see 53-8-25.2 NMSA 1978.

## **§ 53-8-26. Indemnification of officers and directors.**

Each corporation shall have the power to indemnify any director or officer or former director or officer of the corporation against reasonable expenses, costs, and attorneys' fees actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been a director or officer. The indemnification may include any amounts paid to satisfy a judgment or to compromise or settle a claim. The director or officer shall not be indemnified if he shall be adjudged to be liable on the basis that he has breached or failed to perform the duties of his office and the breach or failure to perform constitutes willful misconduct or recklessness. Advance indemnification may be allowed of a director or officer for reasonable expenses to be incurred in connection with the defense of the action, suit or proceeding provided that the director or officer must reimburse the corporation if it is subsequently determined that the director or officer was not entitled to indemnification. Each corporation may make any other indemnification as authorized by the articles of incorporation or bylaws or by a resolution adopted after notice by the members entitled to vote. As used in this section "director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of any foreign or domestic corporation or

nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust.

History: 1978 Comp., § 53-8-26, enacted by Laws 1981, ch. 40, § 1; 1987, ch. 237, § 2; 1987, ch. 238, § 7.

Cross-references. - Also on indemnification of officers and directors, see 53-4-9.1 NMSA 1978.

Repeals and reenactments. - Laws 1981, ch. 40, § 1, repealed former 53-8-26 NMSA 1978, relating to indemnification of officers and directors, and enacted the above section.

The 1987 amendments. - Laws 1987, ch. 237, § 2, designating the provisions of the former section as present Subsection A, therein deleting "director or" preceding "officer" in eight places, and adding Subsection B, was approved April 9, 1987. However, Laws 1987, ch. 238, § 7, also amending this section by inserting "reasonable" preceding "expenses" in the first and fourth sentences, in the third sentence, substituting "shall not be indemnified if he shall be adjudged to be liable on the basis that he has breached or failed to perform the duties of his office and the breach or failure to perform constitutes willful misconduct or recklessness" for "shall not be indemnified if he is guilty of negligence or misconduct in the performance of his duties as a director or officer", deleting "by reason of negligence or misconduct in the performance of his duties" from the end of the fourth sentence, and adding the last sentence, but not giving effect to the changes made by the first 1987 amendment, was approved later on April 9, 1987. This section is set out as amended by Laws 1987, ch. 238, § 7. See 12-1-8 NMSA 1978.

Effective dates. - Laws 1981, ch. 40, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

Law reviews. - For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1317, 1897, 1898.

## **§ 53-8-27. Books and records.**

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors. Each corporation shall keep at its registered office or principal office in New Mexico a record of the names and addresses of its members entitled to vote. All books and records of a corporation may

be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.

History: 1953 Comp., § 51-14-69, enacted by Laws 1975, ch. 217, § 27.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 744.  
Right of member of nonprofit association or corporation to possession, inspection, or use of membership list, 37 A.L.R.4th 1206.  
18 C.J.S. Corporations §§ 501 to 511; 19 C.J.S. Corporations §§ 779, 780.

### **§ 53-8-28. Shares of stock and dividends prohibited; exemption from franchise tax.**

A. A corporation shall not have or issue shares of stock. No dividend shall be paid and no part of the income, profit or assets of a corporation shall be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount to its members, directors or officers for services rendered and may confer benefits upon its members in conformity with its purposes and upon dissolution or final liquidation may make distributions as permitted by the Nonprofit Corporation Act [this article].

B. A corporation incorporated under the Nonprofit Corporation Act shall not be subject to or required to pay a franchise tax unless the corporation receives unrelated business income, as that term is defined in the Internal Revenue Code of 1986, as amended.

History: 1953 Comp., § 51-14-70, enacted by Laws 1975, ch. 217, § 28; 1977, ch. 178, § 5; 1989, ch. 111, § 3.

The 1989 amendment, effective June 16, 1989, added all of the language of Subsection B following "tax".

Applicability. - Laws 1989, ch. 111, § 4 makes the provisions of the act applicable to taxable years beginning on or after January 1, 1989.

Internal Revenue Code. - The federal Internal Revenue Code, referred to in Subsection B, appears as 26 U.S.C. § 1 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 484.  
18 C.J.S. Corporations § 196.

### **§ 53-8-29. Loans to directors and officers.**

Any director or officer who assents to or participates in the making of any loan to a

director or officer shall be personally liable to the corporation for the amount of the loan until the repayment thereof.

History: 1953 Comp., § 51-14-71, enacted by Laws 1975, ch. 217, § 29.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A C.J.S. Corporations § 913.

### **§ 53-8-30. Incorporators.**

One or more persons, including profit and nonprofit corporations, may incorporate a corporation by signing and delivering articles of incorporation in duplicate to the corporation commission.

History: 1953 Comp., § 51-14-72, enacted by Laws 1975, ch. 217, § 30.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 150.  
18 C.J.S. Corporations §§ 35, 36, 51, 62.

### **§ 53-8-31. Articles of incorporation.**

A. The articles of incorporation shall set forth:

- (1) the name of the corporation;
- (2) the period of duration, which may be perpetual;
- (3) the purpose or purposes for which the corporation is organized;
- (4) any provisions, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision for distribution of assets on dissolution or final liquidation;
- (5) the address of its initial registered office, and the name of its initial registered agent at such address;
- (6) the number of directors constituting the initial board of directors, and the names and addresses of the persons who are to serve as the initial directors; and
- (7) the name and address of each incorporator.

B. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in the Nonprofit Corporation Act [this article].

C. Unless the articles of incorporation provide that a change in the number of directors

shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the bylaws shall be controlling. In all other cases, whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling.

History: 1953 Comp., § 51-14-73, enacted by Laws 1975, ch. 217, § 31.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 199 to 216.

18 C.J.S. Corporations §§ 51 to 62.

### **§ 53-8-32. Filing of articles of incorporation.**

A. Duplicate originals of the articles of incorporation and an affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the designated registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation shall be delivered to the corporation commission. If the commission finds that the articles of incorporation and the affidavit conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals and the affidavit in the office of the corporation commission; and

(3) issue a certificate of incorporation to which shall be affixed the other duplicate original.

B. The certificate of incorporation, together with the duplicate original of the articles of incorporation affixed thereto by the corporation commission, shall be returned to the incorporators or their representative.

History: 1953 Comp., § 51-14-74, enacted by Laws 1975, ch. 217, § 32; 1977, ch. 178, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 208, 209, 211, 213.

18 C.J.S. Corporations §§ 51, 62.

### **§ 53-8-33. Effect of incorporation.**

Unless the corporation commission disapproves pursuant to Subsection A of Section 53-8-91 NMSA 1978, upon delivery of the articles of incorporation to the corporation commission, the corporate existence shall begin, and the certificate of incorporation shall be conclusive evidence that all conditions precedent, required to be performed by the incorporators, have been complied with and that the corporation has been incorporated under the Nonprofit Corporation Act [this article], except as against the state in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

History: 1953 Comp., § 51-14-75, enacted by Laws 1975, ch. 217, § 33; 1983, ch. 304, § 11.

The 1983 amendment deleted "issuance of certificate of" preceding "incorporation" in the catchline and substituted "Unless the corporation commission . . . to the corporation commission," for "Upon the issuance of the certificate of incorporation" at the beginning of the section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 67.  
18 C.J.S. Corporations §§ 74 to 77.

### **§ 53-8-34. Organization meetings.**

A. An organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without New Mexico, at the call of a majority of the incorporators, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The incorporators calling the meeting shall give at least three days' notice thereof by mail to each director so named. The notice shall state the time and place of the meeting. The notice shall be deemed to be delivered when deposited in the United States mail addressed to the director at his address as it appears on the records of the corporation, with postage thereon prepaid.

B. A first meeting of the members may be held at the call of the directors, or a majority of them, upon at least three days' notice, for the purposes stated in the notice of the meeting.

History: 1953 Comp., § 51-14-76, enacted by Laws 1975, ch. 217, § 34.

### **§ 53-8-35. Right to amend articles of incorporation.**

A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as are lawful under the Nonprofit Corporation Act [this article].

History: 1953 Comp., § 51-14-77, enacted by Laws 1975, ch. 217, § 35.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 79.  
Power of state to amend charter of a private incorporated charity, 62 A.L.R. 573.  
18 C.J.S. Corporations § 80.

### **§ 53-8-36. Procedure to amend articles of incorporation.**

A. Amendments to the articles of incorporation shall be made in the following manner:

(1) if there are members entitled to vote thereon, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice setting forth the proposed amendment, or a summary of the changes to be effected thereby, shall be given to each member entitled to vote at the meeting within the time and in the manner provided in the Nonprofit Corporation Act [this article] for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least two-thirds of the votes which members present at the meeting or represented by proxy are entitled to cast; or

(2) if there are no members, or no members entitled to vote thereon, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

B. Any number of amendments may be submitted and voted upon at any one meeting.

History: 1953 Comp., § 51-14-78, enacted by Laws 1975, ch. 217, § 36.

### **§ 53-8-37. Articles of amendment.**

The articles of amendment shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary and shall set forth:

A. the name of the corporation;

B. the amendment so adopted;

C. if there are members entitled to vote thereon:

(1) a statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at the meeting, and that the amendment received at least two-thirds of the votes which members present at the meeting or represented by proxy were entitled to cast; or

(2) a statement that the amendment was adopted by a consent in writing signed by all members entitled to vote with respect thereto; and

D. if there are no members, or no members entitled to vote thereon, a statement of such fact, the date of the meeting of the board of directors at which the amendment was adopted, and a statement of the fact that the amendment received the vote of a majority of the directors in office.

History: 1953 Comp., § 51-14-79, enacted by Laws 1975, ch. 217, § 37.

### **§ 53-8-38. Effectiveness of amendment.**

A. Duplicate originals of the articles of amendment shall be delivered to the corporation commission. If the commission finds that the articles of amendment conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in the office of the corporation commission; and

(3) issue a certificate of amendment to which shall be affixed the other duplicate original.

B. The certificate of amendment, together with the duplicate original of the articles of amendment affixed thereto by the corporation commission, shall be returned to the corporation or its representative.

C. Unless the corporation commission disapproves pursuant to Subsection A of Section 53-8-91 NMSA 1978, the amendment shall become effective upon delivery of the articles of amendment to the corporation commission, or on such later date, not more than thirty days subsequent to the delivery thereof to the corporation commission, as shall be provided for in the articles of amendment.

D. No amendment shall affect any existing cause of action in favor of or against the corporation, or any pending action to which the corporation shall be a party or the existing rights of persons other than members; and, in the event the corporate name

shall be changed by amendment, no action brought by or against the corporation under its former name shall abate for that reason.

History: 1953 Comp., § 51-14-80, enacted by Laws 1975, ch. 217, § 38; 1983, ch. 304, § 12.

The 1983 amendment rewrote Subsection C to the extent that a detailed comparison would be impracticable.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-39. Restated articles of incorporation.**

A. A domestic corporation may at any time restate its articles of incorporation as amended.

B. Upon approval by a majority of the directors in office, restated articles of incorporation shall be executed in duplicate by the corporation by its president or vice president and by its secretary or assistant secretary and shall set forth:

(1) the name of the corporation;

(2) the period of its duration;

(3) the purpose or purposes which the corporation is authorized to pursue; and

(4) any other provisions, not inconsistent with law, which are then set forth in the articles of incorporation as amended, except that it shall not be necessary to set forth in the restated articles of incorporation the registered office of the corporation, its registered agent, its directors or its incorporators.

C. The restated articles of incorporation shall state that they correctly set forth the provisions of the articles of incorporation as amended, that they have been duly approved as required by law and that they supersede the original articles of incorporation and all amendments thereto.

D. Duplicate originals of the restated articles of incorporation shall be delivered to the corporation commission. If the commission finds that the restated articles conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in the office of the corporation commission; and

(3) issue a restated certificate of incorporation to which shall be affixed the other duplicate original.

E. The restated certificate of incorporation, together with the duplicate original of the restated articles of incorporation affixed thereto by the corporation commission, shall be returned to the corporation or its representative.

F. Upon the issuance of the restated certificate of incorporation by the corporation commission, the restated articles of incorporation shall become effective and shall supersede the original articles of incorporation and all amendments thereto.

History: 1953 Comp., § 51-14-81, enacted by Laws 1975, ch. 217, § 39.

### **§ 53-8-40. Procedure for merger.**

A. Any two or more domestic corporations may merge into one corporation pursuant to a plan of merger approved in the manner provided in the Nonprofit Corporation Act [this article].

B. Each corporation shall adopt a plan of merger setting forth:

(1) the names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation;

(2) the terms and conditions of the proposed merger;

(3) a statement of any changes in the articles of incorporation of the surviving corporation to be effected by the merger; and

(4) such other provisions with respect to the proposed merger as are deemed necessary or desirable.

History: 1953 Comp., § 51-14-82, enacted by Laws 1975, ch. 217, § 40.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2503.

### **§ 53-8-41. Procedure for consolidation.**

A. Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in the Nonprofit

Corporation Act [this article].

B. Each corporation shall adopt a plan of consolidation setting forth:

(1) the names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation;

(2) the terms and conditions of the proposed consolidation;

(3) with respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under the Nonprofit Corporation Act; and

(4) such other provisions with respect to the proposed consolidation as are deemed necessary or desirable.

History: 1953 Comp., § 51-14-83, enacted by Laws 1975, ch. 217, § 41.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2503.  
19 C.J.S. Corporations § 1603.

### **§ 53-8-42. Adoption of merger or consolidation.**

A. A plan of merger or consolidation shall be adopted in the following manner:

(1) if the members of any merging or consolidating corporation are entitled to vote thereon, the board of directors of the corporation shall adopt a resolution approving the proposed plan and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice setting forth the proposed plan or a summary thereof shall be given to each member entitled to vote at the meeting within the time and in the manner provided in the Nonprofit Corporation Act [this article] for the giving of notice of meetings of members. The proposed plan shall be adopted upon receiving at least two-thirds of the votes which members present at each such meeting or represented by proxy are entitled to cast; or

(2) if any merging or consolidating corporation has no members, or no members entitled to vote thereon, a plan of merger or consolidation shall be adopted at a meeting of the board of directors of the corporation upon receiving the vote of a majority of the directors in office.

B. After adoption, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

History: 1953 Comp., § 51-14-84, enacted by Laws 1975, ch. 217, § 42.

### **§ 53-8-43. Articles of merger or consolidation.**

A. Upon approval, articles of merger or articles of consolidation shall be executed in duplicate by each corporation by its president or a vice president and by its secretary or an assistant secretary, and shall set forth:

(1) the plan of merger or the plan of consolidation;

(2) if the members of any merging or consolidating corporation are entitled to vote thereon, then as to each corporation:

(a) a statement setting forth the date of the meeting of members at which the plan was adopted, that a quorum was present at the meeting, and that the plan received at least two-thirds of the votes which members present at the meeting or represented by proxy were entitled to cast; or

(b) a statement that such amendment was adopted by a consent in writing signed by all members entitled to vote with respect thereto; and

(3) if any merging or consolidating corporation has no members, or no members entitled to vote thereon, then as to each corporation a statement of that fact, the date of the meeting of the board of directors at which the plan was adopted and a statement of the fact that the plan received the vote of a majority of the directors in office.

B. Duplicate originals of the articles of merger or articles of consolidation shall be delivered to the corporation commission. If the commission finds that the articles conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in the office of the corporation commission; and

(3) issue a certificate of merger or a certificate of consolidation to which shall be affixed the other duplicate original.

C. The certificate of merger or certificate of consolidation, together with the duplicate original of the articles of merger or articles of consolidation affixed thereto by the corporation commission, shall be returned to the surviving or new corporation, or its representative.

History: 1953 Comp., § 51-14-85, enacted by Laws 1975, ch. 217, § 43.

## **§ 53-8-44. Effect of merger or consolidation.**

A. Unless the corporation commission disapproves pursuant to Subsection A of Section 53-8-91 NMSA 1978, the merger or consolidation shall become effective upon delivery of the articles of merger or of consolidation to the corporation commission, or on such later date, not more than thirty days subsequent to the delivery thereof to the corporation commission, as shall be provided for in the articles.

B. When a merger or consolidation has been effected:

(1) the several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

(2) the separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

(3) the surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under the Nonprofit Corporation Act [this article];

(4) the surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in the single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of the corporations shall not revert or be in any way impaired by reason of the merger or consolidation;

(5) the surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of the corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation; and

(6) in the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under the

Nonprofit Corporation Act shall be deemed to be the articles of incorporation of the new corporation.

History: 1953 Comp., § 51-14-86, enacted by Laws 1975, ch. 217, § 44; 1983, ch. 304, § 13.

The 1983 amendment rewrote Subsection A to the extent that a detailed comparison would be impracticable.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-45. Merger or consolidation of domestic and foreign corporations.**

A. One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each foreign corporation is organized:

(1) each domestic corporation shall comply with the provisions of the Nonprofit Corporation Act [this article] with respect to the merger or consolidation, of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized; and

(2) if the surviving or new corporation is to be governed by the laws of any state other than New Mexico it shall comply with the provisions of the Nonprofit Corporation Act with respect to foreign corporations if it is to conduct affairs in New Mexico, and in every case it shall file with the corporation commission of New Mexico:

(a) an agreement that it may be served with process in New Mexico in any proceeding for the enforcement of any obligation of any domestic corporation which is a party to such merger or consolidation; and

(b) an irrevocable appointment of the secretary of state of New Mexico as its agent to accept service of process in any such proceeding.

B. The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of New Mexico. If the surviving or new corporation is to be governed by laws of any state other than New Mexico, the effect of the merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except in so far as the laws of the other state provide otherwise.

C. After approval by the members or, if there are no members entitled to vote thereon,

by the board of directors, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

History: 1953 Comp., § 51-14-87, enacted by Laws 1975, ch. 217, § 45.

### **§ 53-8-46. Sale, lease, exchange or mortgage of assets.**

A sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

A. if there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending the sale, lease, exchange, mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at the meeting, within the time and in the manner provided by the Nonprofit Corporation Act [this article] for the giving of notice of meetings of members. At the meeting the members may authorize the sale, lease, exchange, mortgage, pledge or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require at least two-thirds of the votes which members present at the meeting or represented by proxy are entitled to cast. After such authorization by a vote of members, the board of directors, nevertheless, in its discretion, may abandon the sale, lease, exchange, mortgage, pledge or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by members; or

B. if there are no members, or no members entitled to vote thereon, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office.

History: 1953 Comp., § 51-14-88, enacted by Laws 1975, ch. 217, § 46.

### **§ 53-8-47. Voluntary dissolution.**

A. A corporation may dissolve and wind up its affairs in the following manner:

(1) if there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of the dissolution be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider the advisability of dissolving the corporation, shall be given to each member entitled to vote at the meeting, within the time and in the manner provided in the Nonprofit Corporation Act [this article] for the giving of notice of meetings of members. A resolution to dissolve the corporation shall be adopted upon receiving at least two-thirds of the votes which members present at the meeting or represented by proxy are entitled to cast; or

(2) if there are no members, or no members entitled to vote thereon, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

B. Upon the adoption of such resolution by the members, or by the board of directors if there are no members or no members entitled to vote thereon, the corporation shall cease to conduct its affairs except in so far as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and shall proceed to collect its assets and apply and distribute them as provided in the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-89, enacted by Laws 1975, ch. 217, § 47.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2733.  
19 C.J.S. Corporations §§ 1684 to 1693.

### **§ 53-8-48. Distribution of assets.**

The assets of a corporation in the process of dissolution shall be applied and distributed as follows:

A. all liabilities and obligations of the corporation shall be paid and discharged, or adequate provision shall be made therefor;

B. assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements;

C. assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more nonprofit domestic or foreign corporations, nonprofit societies or nonprofit organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan

of distribution adopted as provided in the Nonprofit Corporation Act [this article];

D. other assets, if any, shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws, but in no event may any member, former member, director, former director, officer or former officer receive directly or indirectly any distribution or portion of a distribution of any assets; and

E. any remaining assets may be distributed to such persons, nonprofit societies, nonprofit organizations or nonprofit domestic or foreign corporations whether for profit or nonprofit as may be specified in a plan of distribution adopted as provided in the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-90, enacted by Laws 1975, ch. 217, § 48; 1977, ch. 178, § 7.

Cross-references. - As to propriety of distribution upon dissolution, see 53-8-28 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2707, 2720 to 2725.

Rules and laws of grand lodge as binding on members of local lodge, as regards title to property upon dissolution of latter, 168 A.L.R. 959.

19 C.J.S. Corporations §§ 1730, 1734.

### **§ 53-8-49. Plan of distribution.**

A plan providing for the distribution of assets, not inconsistent with the provisions of the Nonprofit Corporation Act [this article], may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which the Nonprofit Corporation Act requires a plan of distribution, in the following manner:

A. if there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending a plan of distribution and directing the submission thereof to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice setting forth the proposed plan of distribution or a summary thereof shall be given to each member entitled to vote at the meeting, within the time and in the manner provided in the Nonprofit Corporation Act for the giving of notice of meetings of members. The plan of distribution shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting or represented by proxy are entitled to cast; or

B. if there are no members, or no members entitled to vote thereon, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving a vote of a majority of the directors in office.

History: 1953 Comp., § 51-14-91, enacted by Laws 1975, ch. 217, § 49.

### **§ 53-8-50. Revocation of voluntary dissolution proceedings.**

A. A corporation may, at any time prior to the issuance of a certificate of dissolution by the corporation commission, revoke the action theretofore taken to dissolve the corporation, in the following manner:

(1) if there are members entitled to vote thereon, the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of the revocation be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider the advisability of revoking the voluntary dissolution proceedings, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in the Nonprofit Corporation Act [this article] for the giving of notice of meetings of members. A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least two-thirds of the votes which members present at the meeting or represented by proxy are entitled to cast; or

(2) if there are no members, or no members entitled to vote thereon, a resolution to revoke the voluntary dissolution proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

B. Upon the adoption of the resolution by the members, or by the board of directors where there are no members or no members entitled to vote thereon, the corporation may thereupon again conduct its affairs.

History: 1953 Comp., § 51-14-92, enacted by Laws 1975, ch. 217, § 50.

### **§ 53-8-51. Articles of dissolution.**

If voluntary dissolution proceedings have not been revoked, then when all debts, liabilities and obligations of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of the remaining property and assets of the corporation shall have been transferred, conveyed or distributed in accordance with the provisions of the Nonprofit Corporation Act [this article], articles of dissolution shall be executed in duplicate by the corporation by its president or a vice president, and by its secretary or an assistant secretary, which statement shall set forth:

A. the name of the corporation;

B. if there are members entitled to vote thereon:

(1) a statement setting forth the date of the meeting of members at which the resolution to dissolve was adopted, that a quorum was present at the meeting, and that the resolution received at least two-thirds of the votes which members present at the meeting or represented by proxy were entitled to cast; or

(2) a statement that the resolution was adopted by a consent in writing signed by all members entitled to vote with respect thereto;

C. if there are no members, or no members entitled to vote thereon, a statement of such fact, the date of the meeting of the board of directors at which the resolution to dissolve was adopted and a statement of the fact that the resolution received the vote of a majority of the directors in office;

D. that all debts, obligations and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor;

E. a copy of the plan of distribution, if any, as adopted by the corporation, or a statement that no plan was so adopted;

F. that all the remaining property and assets of the corporation have been transferred, conveyed or distributed in accordance with the provisions of the Nonprofit Corporation Act; and

G. that there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order or decree which may be entered against it in any pending suit.

History: 1953 Comp., § 51-14-93, enacted by Laws 1975, ch. 217, § 51.

### **§ 53-8-52. Filing of articles of dissolution.**

A. Duplicate originals of the articles of dissolution shall be delivered to the corporation commission. If the commission finds that such articles of dissolution conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in the office of the corporation commission; and

(3) issue a certificate of dissolution to which shall be affixed the other duplicate original.

B. The certificate of dissolution, together with the duplicate original of the articles of dissolution affixed thereto by the corporation commission, shall be returned to the

representative of the dissolved corporation. Upon the issuance of a certificate of dissolution the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by members, directors and officers as provided in the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-94, enacted by Laws 1975, ch. 217, § 52.

### **§ 53-8-53. Revocation of certificate of incorporation.**

A. The certificate of incorporation of a corporation to conduct affairs in New Mexico may be revoked by the corporation commission upon the conditions prescribed in this section when:

(1) the corporation has failed to file its annual report within the time required by the Nonprofit Corporation Act [this article] or has failed to pay any fees or penalties prescribed by that act when they have become due and payable; or

(2) the certificate of incorporation of the corporation was procured through fraud practiced upon the state; or

(3) the corporation has continued to exceed or abuse the authority conferred upon it by the Nonprofit Corporation Act; or

(4) a misrepresentation has been made of any material matter in any application, report, affidavit or other document submitted by the corporation pursuant to the Nonprofit Corporation Act.

B. No certificate of incorporation of a corporation shall be revoked by the corporation commission unless:

(1) the commission has given the corporation not less than sixty days' notice thereof by mail addressed to its registered office; and

(2) the corporation fails prior to revocation to file an annual report, or pay fees or penalties, or [or] file articles of amendment or articles of merger, or correct a material misrepresentation in any document submitted by the corporation pursuant to the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-95, enacted by Laws 1975, ch. 217, § 53.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2734, 2740, 2741, 2746, 2788 to 2810, 2822, 2824.  
19 C.J.S. Corporations § 1660.

### **§ 53-8-54. Issuance of certificate of revocation.**

A. Upon revoking any certificate of incorporation, the corporation commission shall:

- (1) issue a certificate of revocation in duplicate;
- (2) file one of the certificates in its office; and
- (3) mail to the corporation at its registered office a notice of the revocation accompanied by one of the certificates.

B. Upon the issuance of a certificate of revocation, the authority of the corporation to conduct affairs in New Mexico ceases.

History: 1953 Comp., § 51-14-96, enacted by Laws 1975, ch. 217, § 54.

### **§ 53-8-55. Jurisdiction of court to liquidate assets and affairs of corporation.**

A. District courts shall have full power to liquidate the assets and affairs of a corporation:

(1) in an action by a member or director when it is made to appear that:

(a) the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation is being suffered or is threatened by reason thereof, and either that the members are unable to break the deadlock or there are no members having voting rights; or

(b) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

(c) the members entitled to vote in the election of directors are deadlocked in voting power and have failed for at least two years to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(d) the corporate assets are being misapplied or wasted; or

(e) the corporation is unable to carry out its purposes;

(2) in an action by a creditor when:

(a) the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied and it is established that the corporation is insolvent; or

(b) the corporation has admitted in writing that the claim of the creditor is due and owing

and it is established that the corporation is insolvent; or

(3) upon application by a corporation to have its dissolution continued under the supervision of the court.

B. Proceedings under this section shall be brought in the county in which the registered office or the principal office of the corporation is situated.

C. It shall not be necessary to make directors or members parties to any such action or proceedings unless relief is sought against them personally.

History: 1953 Comp., § 51-14-97, enacted by Laws 1975, ch. 217, § 55.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2812.  
19 C.J.S. Corporations § 1648.

### **§ 53-8-56. Procedure in liquidation of corporation by court.**

A. In proceedings to liquidate the assets and affairs of a corporation the district court shall have the power to issue injunctions; to appoint a receiver or receivers pendente lite, with such powers and duties as the court, from time to time, may direct; and to take such other proceedings as may be requisite to preserve the corporate assets wherever situated, and carry on the affairs of the corporation until a full hearing can be had.

B. After a hearing had upon such notice as the district court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation. The liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The order appointing the liquidating receiver or receivers shall state their powers and duties. The powers and duties may be increased or diminished at any time during the proceedings.

C. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied and distributed as follows:

(1) all costs and expenses of the court proceedings and all liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor;

(2) assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution or liquidation, shall be returned, transferred or conveyed in accordance with the requirements;

(3) assets received and held by the corporation subject to limitations permitting their use

only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution or liquidation, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation as the court may direct;

(4) other assets, if any, shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive right of members, or any class or classes of members, or provide for distribution to others; and

(5) any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether for profit or not for profit, specified in the plan of distribution adopted as provided in the Nonprofit Corporation Act [this article], or where no plan of distribution has been adopted, as the court may direct.

D. The district court shall have power to allow, from time to time, as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceeding, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of the assets.

E. A receiver of a corporation appointed under the provisions of this section shall have authority to sue and defend in all courts in his own name as receiver of the corporation. The district court appointing the receiver shall have exclusive jurisdiction of the corporation and its property, wherever situated.

History: 1953 Comp., § 51-14-98, enacted by Laws 1975, ch. 217, § 56.

Cross-references. - As to propriety of distribution upon dissolution, see 53-8-28 NMSA 1978.

### **§ 53-8-57. Qualification of receivers.**

A receiver shall in all cases be a citizen of the United States or a corporation for profit authorized to act as receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in New Mexico and shall in all cases give bond as the court may direct with sureties as the court may require.

History: 1953 Comp., § 51-14-99, enacted by Laws 1975, ch. 217, § 57.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations §§ 1749, 1751.

### **§ 53-8-58. Filing of claims in liquidation proceedings.**

In proceedings to liquidate the assets and affairs of a corporation the district court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in a form the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall be not less than four months from the date of the order, as the last day for the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the corporation.

History: 1953 Comp., § 51-14-100, enacted by Laws 1975, ch. 217, § 58.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2862 to 2870, 2873.

19 C.J.S. Corporations §§ 1763 to 1766.

### **§ 53-8-59. Discontinuance of liquidation proceedings.**

The liquidation of the assets and affairs of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

History: 1953 Comp., § 51-14-101, enacted by Laws 1975, ch. 217, § 59.

### **§ 53-8-60. Decree of involuntary dissolution.**

In proceedings to liquidate the assets and affairs of a corporation, when the costs and expenses of the proceedings and all debts, obligations and liabilities of the corporation have been paid and discharged and all of its remaining property and assets distributed in accordance with the provisions of the Nonprofit Corporation Act [this article], or in case its property and assets are not sufficient to satisfy and discharge the costs, expenses, debts and obligations, and all the property and assets have been applied so far as they will go to their payment, the district court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease.

History: 1953 Comp., § 51-14-102, enacted by Laws 1975, ch. 217, § 60.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations §§ 1716, 1725.

### **§ 53-8-61. Filing of decree of dissolution.**

In case the district court enters a decree dissolving a corporation, it shall be the duty of the clerk of the court to file a certified copy of the decree with the corporation commission. No fee shall be charged by the commission for the filing thereof.

History: 1953 Comp., § 51-14-103, enacted by Laws 1975, ch. 217, § 61.

### **§ 53-8-62. Deposits with state treasurer.**

Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to any person who is unknown or cannot be found, or who is under disability and there is no person legally competent to receive the distributive portion, shall be reduced to cash and deposited with the state treasurer and shall be paid over to such person or to his legal representative upon proof satisfactory to the state treasurer of his right thereto.

History: 1953 Comp., § 51-14-104, enacted by Laws 1975, ch. 217, § 62.

### **§ 53-8-63. Survival of remedy after dissolution.**

The dissolution of a corporation either by the issuance of a certificate of dissolution by the corporation commission, or by a decree of court when the court has not liquidated the assets and affairs of the corporation as provided in the Nonprofit Corporation Act [this article], or by expiration of its period of duration, shall not take away or impair any remedy available to or against the corporation, its directors, officers or members, for any right or claim existing, or any liability incurred, prior to the dissolution if action or other proceeding thereon is commenced within two years after the date of dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The members, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If the corporation was dissolved by the expiration of its period of duration, the corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

History: 1953 Comp., § 51-14-105, enacted by Laws 1975, ch. 217, § 63.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2896, 2897.

Service of process on dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

19 C.J.S. Corporations §§ 1772 to 1780.

### **§ 53-8-64. Admission of foreign corporation.**

A. No foreign corporation has the right to conduct affairs in New Mexico until it has procured a certificate of authority to do so from the corporation commission. No foreign corporation is entitled to procure a certificate of authority under the Nonprofit Corporation Act [this article] to conduct in New Mexico any affairs which a corporation organized under that act is prohibited from conducting. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which the corporation is organized governing its organization and internal affairs differ from the laws of this state. Nothing in the Nonprofit Corporation Act shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation.

B. Without excluding other activities which may not constitute conducting affairs in New Mexico, a foreign corporation shall not be considered to be conducting affairs in this state, for the purposes of the Nonprofit Corporation Act, by reason of carrying on in this state any one or more of the following activities:

(1) maintaining or defending any action or suit or any administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) holding meetings of its directors or members or carrying on other activities concerning its internal affairs;

(3) maintaining bank accounts;

(4) creating evidences of debt, mortgages or liens on real or personal property;

(5) securing or collecting debts due to it or enforcing any rights in property securing the same;

(6) conducting its affairs in interstate commerce;

(7) granting funds;

(8) distributing information to its members; and

(9) conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

History: 1953 Comp., § 51-14-106, enacted by Laws 1975, ch. 217, § 64.

Cross-references. - For effect of conducting affairs in state without certificate, see 53-8-81 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations § 193. Applicability to corporations not organized for profit of statutes prescribing conditions

under which foreign corporations may do business within state, 37 A.L.R. 1283.  
20 C.J.S. Corporations § 1810.

### **§ 53-8-65. Powers of foreign corporation.**

A foreign corporation which has received a certificate of authority under the Nonprofit Corporation Act [this article] shall, until a certificate of revocation or of withdrawal has been issued as provided in that act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which the certificate of authorization is issued; and, except as otherwise provided in the Nonprofit Corporation Act, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

History: 1953 Comp., § 51-14-107, enacted by Laws 1975, ch. 217, § 65.

### **§ 53-8-66. Corporate name of foreign corporation.**

No certificate of authority shall be issued to a foreign corporation unless the corporate name of the corporation:

A. shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation;

B. shall not be the same as, or confusingly similar to, the name of any corporation, whether for profit or not for profit, existing under the laws of New Mexico, or foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this state, or a corporate name reserved or registered as permitted by the laws of this state; and

C. shall be expressed in English letters.

History: 1953 Comp., § 51-14-108, enacted by Laws 1975, ch. 217, § 66.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 185 to 192.

20 C.J.S. Corporations § 1887.

### **§ 53-8-67. Change of name by foreign corporation.**

Whenever a foreign corporation which is authorized to conduct affairs in New Mexico changes its name to one under which a certificate of authority would not be granted to it

on application therefor, the certificate of authority of the corporation shall be suspended and it shall not conduct any affairs in New Mexico until it has changed its name to a name which is available to it under the laws of this state.

History: 1953 Comp., § 51-14-109, enacted by Laws 1975, ch. 217, § 67.

### **§ 53-8-68. Application for certificate of authority.**

A. A foreign corporation, in order to procure a certificate of authority to conduct affairs in New Mexico, shall make application to the corporation commission, which application shall set forth:

(1) the name of the corporation and the state or country under the laws of which it is incorporated;

(2) the date of incorporation and the period of duration of the corporation;

(3) the address of the registered office of the corporation in the state or country under the laws of which it is incorporated and the address of the principal office of the corporation, if different from the address of the registered office;

(4) the address of the proposed registered office of the corporation in New Mexico and the name of its proposed registered agent in this state at such address;

(5) the purpose or purposes of the corporation which it proposes to pursue in conducting its affairs in New Mexico;

(6) the names and respective addresses of the directors and officers of the corporation; and

(7) such additional information as may be necessary or appropriate in order to enable the corporation commission to determine whether the corporation is entitled to a certificate of authority to conduct affairs in New Mexico.

B. The application shall be made on forms prescribed and furnished by the corporation commission and shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary.

History: 1953 Comp., § 51-14-110, enacted by Laws 1975, ch. 217, § 68; 1977, ch. 178, § 8.

### **§ 53-8-69. Filing of application for certificate of authority.**

A. Duplicate originals of the application of the corporation for a certificate of authority, a

certificate of good standing and compliance issued by the appropriate official of the state or country under the laws of which the corporation is incorporated; and an affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the designated registered agent, in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation, shall be delivered to the corporation commission.

B. If the corporation commission finds that the application and the affidavit conform to law, it shall, when all fees have been paid as prescribed in the Nonprofit Corporation Act [this article]:

(1) endorse on each of the documents the word "Filed" and the month, day and year of the filing thereof;

(2) file in the office of the corporation commission the duplicate originals of the application and the affidavit; and

(3) issue a certificate of authority to conduct affairs in New Mexico to which shall be affixed the other duplicate original application.

C. The certificate of authority, together with the duplicate original of the application affixed thereto by the corporation commission, shall be returned to the corporation or its representative.

History: 1953 Comp., § 51-14-111, enacted by Laws 1975, ch. 217, § 69; 1977, ch. 178, § 9; 1983, ch. 304, § 14.

The 1983 amendment inserted "in which the officer . . . as its registered agent" near the end of Subsection A, deleted "together with a copy of its articles of incorporation, or restated articles of incorporation, and all amendments thereto, duly certified by the proper officer of the state or country under the laws of which it is incorporated" at the end of Subsection A, substituted "and" for a comma following "application" and deleted "and the copy of the articles of incorporation, or the restated articles of incorporation, and amendments thereto" at the end of Paragraph (2) of Subsection B.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-70. Effect of [certificate of] authority.**

Unless the corporation commission disapproves pursuant to Subsection A of Section 53-8-91 NMSA 1978, upon delivery of the application for a certificate of authority to the

corporation commission, the corporation shall be authorized to conduct affairs in New Mexico for those purposes set forth in its application, subject, however, to the right of this state to suspend or to revoke such authority as provided in the Nonprofit Corporation Act [this article].

History: 1953 Comp., § 51-14-112, enacted by Laws 1975, ch. 217, § 70; 1983, ch. 304, § 15.

The 1983 amendment substituted "Unless the corporation commission . . . to the corporation commission," for "Upon the issuance of a certificate of authority by the corporation commission."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M Const., art. IV, § 23.

### **§ 53-8-71. Registered office and registered agent of foreign corporation.**

Each foreign corporation authorized to conduct affairs in New Mexico shall have and continuously maintain in this state:

A. a registered office which may be, but need not be, the same as its principal office; and

B. a registered agent, which agent may be either an individual resident in New Mexico whose business office is identical with the registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this state, having an office identical with the registered office.

History: 1953 Comp., § 51-14-113, enacted by Laws 1975, ch. 217, § 71.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations § 263. 20 C.J.S. Corporations § 1815.

### **§ 53-8-72. Change of registered office or registered agent of foreign corporation.**

A. A foreign corporation authorized to conduct affairs in New Mexico may change its registered office or change its registered agent, or both, upon filing in the office of the corporation commission a statement setting forth:

(1) the name of the corporation;

(2) the address of its then registered office;

(3) if the address of its registered office is changed, the address to which the registered office is to be changed;

(4) the name of its registered agent;

(5) if its registered agent be changed:

(a) the name of its successor registered agent; and

(b) an affidavit executed by the successor registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the successor registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation;

(6) that the address of its registered office and the address of the office of its registered agent, as changed, will be identical; and

(7) that such change was authorized by resolution duly adopted by its board of directors.

B. Such statement shall be executed by the corporation by its president or a vice president and delivered to the corporation commission. If the commission finds that such statement conforms to the provisions of the Nonprofit Corporation Act [this article], it shall file the statement in its office, and upon such filing, the change of address of the registered office, or the appointment of a new registered agent, or both, shall become effective.

C. Any registered agent in New Mexico appointed by a foreign corporation may resign as agent upon filing a written notice, executed in duplicate, with the corporation commission who shall mail a copy to the foreign corporation at its principal office in the state or country under the laws of which it is incorporated as shown by its most recent annual report. The appointment of an agent shall terminate upon the expiration of thirty days after receipt of such notice by the corporation commission.

D. If a registered agent changes his or its business address to another place within the same county, he or it may change such address and the address of the registered office of any corporations of which he or it is the registered agent by filing a statement as required above except that it need be signed only by the registered agent and need not be responsive to the provisions of Paragraphs (5) and (7) of Subsection A of this section and must recite that a copy of the statement has been mailed to each such corporation.

History: 1953 Comp., § 51-14-114, enacted by Laws 1975, ch. 217, § 72; 1977, ch. 178, § 10.

### **§ 53-8-73. Service of process on foreign corporation.**

The registered agent appointed by a foreign corporation authorized to transact business in New Mexico shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served. Nothing in this section limits or affects the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

History: 1953 Comp., § 51-14-115, enacted by Laws 1975, ch. 217, § 73.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 263, 264.

20 C.J.S. Corporations §§ 1815, 1942, 1943, 1946.

### **§ 53-8-74. Repealed.**

Repeals. - Laws 1983, ch. 304, § 73, repeals 53-8-74 NMSA 1978, relating to amendment of the articles of incorporation of a foreign corporation.

Laws 1983, ch. 304 contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-75. Merger of foreign corporation authorized to conduct affairs in this state.**

Whenever a foreign corporation authorized to conduct affairs in New Mexico is a party to a statutory merger permitted by the laws of the state or country under the laws of which it is incorporated, it shall, within thirty days after the merger becomes effective, file with the corporation commission a copy of the articles of merger duly certified by the proper officer of the state or country under the laws of which the statutory merger was effected. It shall not be necessary for such corporation to procure either a new or amended certificate of authority to conduct affairs in this state unless the name of the corporation is changed by the merger or unless the corporation desires to pursue in New Mexico other or additional purposes than those which it is then authorized to pursue in New Mexico or unless the surviving corporation is to conduct affairs in New Mexico but has not procured a certificate of authority to conduct affairs in this state.

History: 1953 Comp., § 51-14-117, enacted by Laws 1975, ch. 217, § 75; 1983, ch. 304, § 16.

The 1983 amendment deleted "and such corporation shall be the surviving corporation," preceding "it shall" in the first sentence and added "or unless the surviving corporation . . . in this state" at the end of the last sentence.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-76. Amended certificate of authority.**

A. A foreign corporation authorized to conduct affairs in New Mexico shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in New Mexico other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the corporation commission.

B. The requirements in respect to the form and contents of the application, the manner of its execution, the filing of duplicate originals thereof with the corporation commission, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority.

History: 1953 Comp., § 51-14-118, enacted by Laws 1975, ch. 217, § 76.

### **§ 53-8-77. Withdrawal of foreign corporation.**

A. A foreign corporation authorized to conduct affairs in New Mexico may withdraw from this state upon procuring from the corporation commission a certificate of withdrawal. In order to procure the certificate of withdrawal, the foreign corporation shall deliver to the commission an application for withdrawal, which shall set forth:

(1) the name of the corporation and the state or country under the laws of which it is incorporated;

(2) that the corporation is not conducting affairs in New Mexico;

(3) that the corporation surrenders its authority to conduct affairs in New Mexico;

(4) that the corporation revokes the authority of its registered agent in New Mexico to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to conduct affairs in this state may thereafter be made on

the corporation by service thereof on the secretary of state; and

(5) a post-office address to which the corporation commission may mail a copy of any process against the corporation that may be served on him.

B. The application for withdrawal shall be made on forms prescribed and furnished by the corporation commission and shall be executed by the corporation by its president or a vice president and by its secretary or an assistant secretary, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by the receiver or trustee.

History: 1953 Comp., § 51-14-119, enacted by Laws 1975, ch. 217, § 77.

### **§ 53-8-78. Filing of application for withdrawal.**

A. Duplicate originals of the application for withdrawal shall be delivered to the corporation commission. If the commission finds that the application conforms to the provisions of the Nonprofit Corporation Act [this article] it shall, when all fees have been paid as prescribed in that act:

(1) endorse on each of the duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in the office of the corporation commission; and

(3) issue a certificate of withdrawal to which shall be affixed the other duplicate original.

B. The certificate of withdrawal, together with the duplicate original of the application for withdrawal affixed thereto by the corporation commission, shall be returned to the corporation or its representative. Upon the issuance of the certificate of withdrawal, the authority of the corporation to conduct affairs in New Mexico shall cease.

History: 1953 Comp., § 51-14-120, enacted by Laws 1975, ch. 217, § 78.

### **§ 53-8-79. Revocation of certificate of authority.**

A. The certificate of authority of a foreign corporation to conduct affairs in New Mexico may be revoked by the corporation commission upon the conditions prescribed in this section when:

(1) the corporation has failed to file its annual report within the time required by the Nonprofit Corporation Act [this article] or has failed to pay any fees or penalties prescribed by that act when they have become due and payable; or

(2) the corporation has failed to appoint and maintain a registered agent in New Mexico as required by the Nonprofit Corporation Act; or

(3) the corporation has failed, after change of its registered agent, to file in the office of the corporation commission a statement of such change as required by the Nonprofit Corporation Act; or

(4) the corporation has failed to file in the office of the corporation commission any amendment to its articles of incorporation or any articles of merger within the time prescribed by the Nonprofit Corporation Act; or

(5) the certificate of authority of the corporation was procured through fraud practiced upon the state; or

(6) the corporation has continued to exceed or abuse the authority conferred upon it by the Nonprofit Corporation Act; or

(7) a misrepresentation has been made of any material matter in any application, report, affidavit or other document submitted by the corporation pursuant to the Nonprofit Corporation Act.

B. No certificate of authority of a foreign corporation shall be revoked by the corporation commission unless:

(1) the commission has given the corporation not less than sixty days' notice thereof by mail addressed to its registered office in New Mexico and either to its principal office in the state or country under the laws of which it is incorporated or the principal office of the corporation as each address is shown in the last annual report filed with the commission; and

(2) the corporation fails prior to revocation to file an annual report, or pay fees or penalties, or file the required statement of change of registered agent, or file articles of amendment or articles of merger, or correct such misrepresentation pursuant to the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-121, enacted by Laws 1975, ch. 217, § 79; 1977, ch. 178, § 11.

Cross-references. - As to appeal from corporation commission, see 53-8-91 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations § 215. 20 C.J.S. Corporations § 1843.

## **§ 53-8-80. Issuance of certificate of revocation.**

A. Upon revoking any certificate of authority, the corporation commission shall:

(1) issue a certificate of revocation in triplicate;

(2) file one of the certificates in its office; and

(3) mail to the corporation at its registered office in New Mexico, and also either to its principal office in the state or country under the laws of which it is incorporated or to the principal office of the corporation at the address as shown in the last annual report filed with the commission, a notice of the revocation accompanied by one of the certificates.

B. Upon the issuance of a certificate of revocation, the authority of the corporation to conduct affairs in New Mexico ceases.

History: 1953 Comp., § 51-14-122, enacted by Laws 1975, ch. 217, § 80; 1977, ch. 178, § 12.

### **§ 53-8-81. Conducting affairs without certificate of authority.**

A. No foreign corporation which is conducting affairs in New Mexico without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state until the corporation shall have obtained a certificate of authority. Nor shall any action, suit or proceeding be maintained in any court of New Mexico by any successor or assignee of the corporation on any right, claim or demand arising out of the conduct of affairs by the corporation in this state, until a certificate of authority has been obtained by the corporation or by a corporation which has acquired all, or substantially all, of its assets.

B. The failure of a foreign corporation to obtain a certificate of authority to conduct affairs in New Mexico shall not impair the validity of any contract or act of the corporation, and shall not prevent the corporation from defending any action, suit or proceeding in any district court of this state.

C. A foreign corporation which conducts affairs in New Mexico without a certificate of authority shall be liable to this state, for the years or parts thereof during which it conducted affairs in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by the Nonprofit Corporation Act [this article] upon the corporation had it duly applied for and received a certificate of authority to conduct affairs in this state as required by that act and thereafter filed all reports required by that act, plus all penalties imposed by that act for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due New Mexico under the provisions of this section.

History: 1953 Comp., § 51-14-123, enacted by Laws 1975, ch. 217, § 81.

Cross-references. - For activities not constituting conducting affairs in state, see 53-8-64 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations § 280. 20 C.J.S. Corporations §§ 1856 to 1860.

### **§ 53-8-82. Annual report.**

A. Each domestic corporation and each foreign corporation authorized to conduct affairs in New Mexico shall file, within the time prescribed by the Nonprofit Corporation Act [this article], on forms prescribed and furnished by the commission to the corporation not less than thirty days prior to the date such report is due, an annual report setting forth:

(1) the name of the corporation and the state or country under the laws of which it is incorporated;

(2) the address of the registered office of the corporation in New Mexico, and the name of its registered agent in this state at such address, and, in the case of a foreign corporation, the address of its registered office in the state or country under the laws of which it is incorporated and the address of the principal office of the corporation, if different from the address of the registered office;

(3) a brief statement of the character of the affairs which the corporation is actually conducting, or, in the case of a foreign corporation, which the corporation is actually conducting in New Mexico; and

(4) the names and respective addresses of the directors and officers of the corporation.

B. The report shall be signed and sworn to by any two of its directors or officers. If the corporation is in the hands of a receiver or trustee, the report shall be executed on behalf of the corporation by the receiver or trustee. A copy of the report shall be maintained at the corporation's principal place of business as contained in the report and shall be made available to the general public for inspection during regular business hours.

History: 1953 Comp., § 51-14-124, enacted by Laws 1975, ch. 217, § 82; 1977, ch. 178, § 13; 1979, ch. 180, § 1; 1989, ch. 294, § 3.

The 1989 amendment, effective January 1, 1990, deleted former Subsection A(5), relating to a statement required if fifty percent or more of the corporation's total annual income is from state and federal sources; in Subsection B, substituted "any two of its directors or officers" for "the president and secretary of the board of directors or, if there are no officers, by the directors" in the first sentence; and deleted former Subsection C, which defined the phrase "state or federal funds" as used in this section.

### **§ 53-8-83. Filing of annual report; initial report; supplemental report; extension of time.**

A. The annual report of a domestic or foreign corporation shall be delivered to the corporation commission on or before the fifteenth day of the fifth month following the end of its taxable year, except that the first annual report of a domestic or foreign corporation shall be filed within thirty days of the date on which its certificate of incorporation or its certificate of authority, as the case may be, was issued by the corporation commission.

B. A supplemental report shall be filed with the commission, within thirty days, if, after the filing of the annual report required under the Nonprofit Corporation Act [this article], a change is made in:

(1) the name of the corporation;

(2) the mailing address, street address or the geographical location of its registered office in this state and the name of the agent upon whom process against the corporation may be served;

(3) the name or address of any of the directors or officers of the corporation or the date when the term of office of each expires; or

(4) the character of its business and its principal place of business within or without the state.

C. Proof to the satisfaction of the commission that prior to the due date of any report required by Subsection A or B of this section the report was deposited in the United States mail in a sealed envelope, properly addressed, with postage prepaid, shall be deemed compliance with the requirements of this section. If the commission finds that the report conforms to the requirements of the Nonprofit Corporation Act, it shall file the same. If the commission finds that it does not so conform, it shall promptly return the report to the corporation for any necessary corrections, in which event the penalties prescribed for failure to file the report within the time provided shall not apply, if the report is corrected to conform to the requirements of the Nonprofit Corporation Act and returned to the commission within thirty days from the date on which it was mailed to the corporation by the commission.

D. The commission may, upon application by the nonprofit corporation and for good cause shown, extend, for no more than a total of twelve months, the date on which any return required by the provisions of the Nonprofit Corporation Act must be filed or the date on which the payment of any fee is required, but no extension shall prevent the accrual of interest as otherwise provided by law. The commission shall, when an extension of time has been granted a nonprofit corporation under the United States Internal Revenue Code for the time in which to file a return, grant the corporation the

same extension of time to file the required return and to pay the required fees, provided that a copy of the approved federal extension of time is attached to the corporation's report, and provided further that no such extension shall prevent the accrual of interest as otherwise provided by law.

E. Nothing contained in this section shall prevent the collection of any fee, penalty or interest due upon the failure of any corporation to submit the required report.

F. No annual or supplemental report required to be filed under this section shall be deemed to have been filed if the fees accompanying the report have been paid by check, and which check is dishonored upon presentation.

History: 1953 Comp., § 51-14-125, enacted by Laws 1975, ch. 217, § 83; 1979, ch. 180, § 2; 1989, ch. 294, § 4.

The 1989 amendment, effective January 1, 1990, in Subsection A, substituted "fifth month" for "third month" near the beginning and, in Subsection B(2), deleted "the description of" following "street address or" near the beginning.

Internal Revenue Code. - The United States Internal Revenue Code, referred to in the second sentence in Subsection D, appears as 26 U.S.C. § 1 et seq.

### **§ 53-8-84. Repealed.**

### **§ 53-8-85. Fees for filing documents and issuing certificates.**

The corporation commission shall charge and collect for:

A. filing articles of incorporation and issuing a certificate of incorporation, ten dollars (\$10.00);

B. filing articles of amendment and issuing a certificate of amendment, five dollars (\$5.00);

C. filing restated articles of incorporation and issuing a restated certificate of incorporation, five dollars (\$5.00);

D. filing articles of merger or consolidation and issuing a certificate of merger or consolidation, five dollars (\$5.00);

E. filing a statement of change of address of registered office or change of registered agent, or both, one dollar (\$1.00);

F. filing articles of dissolution, five dollars (\$5.00);

G. filing an application of a foreign corporation for a certificate of authority to conduct affairs in New Mexico and issuing a certificate of authority, ten dollars (\$10.00);

H. filing an application of a foreign corporation for an amended certificate of authority to conduct affairs in New Mexico and issuing an amended certificate of authority, five dollars (\$5.00);

I. filing an application to reserve a corporation name or filing a notice to transfer of a reserved corporate name, five dollars (\$5.00);

J. filing a copy of articles of merger of a foreign corporation holding a certificate of authority to conduct affairs in New Mexico, five dollars (\$5.00);

K. filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal, five dollars (\$5.00);

L. filing any other statement or report, including an annual report, of a domestic or foreign corporation, one dollar (\$1.00); and

M. issuing a certificate of good standing and compliance, two dollars (\$2.00).

History: 1953 Comp., § 51-14-127, enacted by Laws 1975, ch. 217, § 85; 1977, ch. 178, § 14; 1983, ch. 304, § 17; 1988, ch. 93, § 2.

The 1983 amendment substituted present Subsection I for former Subsection I, which read: "filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to conduct affairs in New Mexico, five dollars (\$5.00)" and added Subsection N.

The 1988 amendment, effective May 18, 1988, deleted Subsection N which read "reviewing documents and reports to be delivered to the corporation commission, and indicating approval thereof before delivery to the corporation commission, fifty dollars (\$50.00)."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-86. Recordkeeping.**

The commission shall provide, pursuant to the provisions of the Public Records Act [14-3-1 to 14-3-16, 14-3-18 NMSA 1978], for the retention, storage and destruction of annual reports filed with the commission.

History: 1953 Comp., § 51-14-127.1, enacted by Laws 1977, ch. 178, § 15.

### **§ 53-8-86.1. Fees of state corporation commission; dishonored check; civil penalty.**

Any person or corporation who pays a fee by check to the state corporation commission, and which check is dishonored upon presentation, is liable to the commission for such fees together with a civil penalty of ten dollars (\$10.00) for each such check.

History: 1978 Comp., § 53-8-86.1, enacted by Laws 1979, ch. 180, § 3.

### **§ 53-8-87. Miscellaneous charges.**

The corporation commission shall charge and collect for furnishing a copy of any document, instrument or paper relating to a corporation, seventy-five cents (\$.75) per page. In addition, if certifying the document, one dollar (\$1.00) shall be paid for the certificate and affixing the seal thereto.

History: 1953 Comp., § 51-14-128, enacted by Laws 1975, ch. 217, § 86; 1977, ch. 178, § 16.

### **§ 53-8-88. Penalty imposed upon corporation.**

Each corporation, domestic or foreign, that fails or refuses to file any report for any year within the time prescribed by the Nonprofit Corporation Act [this article] shall be subject to a penalty of ten dollars (\$10.00) to be assessed by the corporation commission.

History: 1953 Comp., § 51-14-129, enacted by Laws 1975, ch. 217, § 87; 1983, ch. 304, § 18.

The 1983 amendment substituted "any report" for "its annual report" and substituted "ten dollars (\$10.00)" for "fifty dollars (\$50.00)."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-88.1. Dormant corporations; statement in lieu of annual report.**

A. Whenever any corporation is no longer actively conducting affairs in this state or carrying out the purposes of its incorporation, any two of its directors or officers may unite in signing a statement to that effect; the statement shall be filed in lieu of the required annual report. Upon the filing of this statement and the payment of all fees, penalties and interest, the commission shall be authorized to strike the name of the corporation from the list of active corporations in this state; but this action shall not be construed in any sense as a formal dissolution of the corporation nor shall the corporation be relieved thereby from any outstanding obligation. Any corporation in this class may be fully revived by the resumption of actively conducting affairs and the filing of an annual report by the provision of this section.

B. Any corporation in this class may continue in this class by filing a statement of renewal every five years to the effect that it is not actively conducting affairs in this state nor carrying out the purposes of its incorporation. Sixty days after written notice of failure to file a statement of renewal has been mailed to its registered agent and also to the principal office of the corporation as shown in the last report filed with the commission, the corporation shall have its certificate of incorporation or authority cancelled by the commission without further proceedings unless the statement of renewal is filed and all fees are paid within that sixty-day period.

History: 1978 Comp., § 53-8-88.1, enacted by Laws 1983, ch. 304, § 19.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-89. Reports; affirmation; penalty.**

A. All reports required to be filed with the commission pursuant to the Nonprofit Corporation Act [this article] shall contain the following affirmation: "Under penalties of perjury, I declare and affirm that I have examined this report, including the accompanying schedules and statements, and that all statements contained therein are true and correct."

B. Any person who makes and subscribes any report required under the Nonprofit Corporation Act that contains a false statement, which statement is known to be false by such person, is guilty of perjury and upon conviction shall be punished as provided for in the perjury statutes of this state.

History: 1978 Comp., § 53-8-89, enacted by Laws 1979, ch. 180, § 4.

Repeals and reenactments. - Laws 1979, ch. 180, § 4, repeals former 53-8-89 NMSA 1978, relating to penalties imposed upon directors and officers, and enacts the above section.

Effective dates. - Laws 1979, ch. 180, § 5, makes the act effective on July 1, 1979.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1846, 1859 to 1864.

19 C.J.S. Corporations § 895.

### **§ 53-8-90. Authority to make refunds.**

In response to a written claim for a refund for overpayment of a fee collected by the commission pursuant to the Nonprofit Corporation Act [this article], the commission or its delegate may authorize the refund to a corporation, a foreign corporation, a nonprofit corporation or a person of any amount determined by the commission or its delegate to have been erroneously paid to the commission.

History: 1953 Comp., § 51-14-130.1, enacted by Laws 1977, ch. 178, § 17.

### **§ 53-8-91. Appeal from corporation commission.**

A. If the corporation commission fails to approve any articles of incorporation, amendment, merger, consolidation or dissolution, or any other document required by the Nonprofit Corporation Act [this article] to be approved by the corporation commission before the same is filed in its office, the commission shall, within fifteen working days after the delivery thereof, give written notice of its disapproval to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. The person or corporation may appeal the disapproval to the district court of the county of Santa Fe by filing with the clerk of the court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the corporation commission. The matter shall be tried de novo by the district court, and the court shall either sustain the action of the commission or direct it to take such action as the court may deem proper.

B. If the corporation commission revokes a certificate of authority to conduct affairs in New Mexico of any foreign corporation or a certificate of incorporation of a domestic corporation, pursuant to the provisions of the Nonprofit Corporation Act, the foreign or domestic corporation may appeal to the district court of the county of Santa Fe by filing with the clerk of the court a petition setting forth a copy of its certificate of authority or incorporation and a copy of the notice of revocation given by the corporation commission. The matter shall be tried de novo by the district court, and the court shall either sustain the action of the commission or direct it to take such action as the court may deem proper.

C. Appeals from all final orders and judgments entered by the district court under this section in review of any ruling or decision of the corporation commission may be taken as in other civil actions.

History: 1953 Comp., § 51-14-131, enacted by Laws 1975, ch. 217, § 89; 1983, ch. 304, § 20.

The 1983 amendment substituted "fifteen working" for "ten" near the middle of the first sentence of Subsection A.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-8-92. Issuance of certificate of good standing and compliance.**

The commission may issue a certificate of good standing and compliance if the corporation requesting the certificate has paid all fees due at the time of the request.

History: 1953 Comp., § 51-14-131.1, enacted by Laws 1977, ch. 178, § 18.

### **§ 53-8-93. Certificates and certified copies to be received in evidence.**

All certificates issued by the corporation commission in accordance with the provisions of the Nonprofit Corporation Act [this article], and all copies of documents filed in the commission's office in accordance with the provisions of the Nonprofit Corporation Act, when certified by the commission, shall be taken and received in all courts, public offices and official bodies as prima facie evidence of the facts therein stated. A certificate by the corporation commission under the great seal of New Mexico, as to the existence or nonexistence of the facts relating to the corporations which would not appear from a certified copy of any of the foregoing documents or certificates, shall be taken and received in all courts, public offices and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

History: 1953 Comp., § 51-14-132, enacted by Laws 1975, ch. 217, § 90.

### **§ 53-8-94. Forms to be furnished by corporation commission.**

Forms for all documents to be filed in the office of the corporation commission may be furnished by the commission on request therefor, but the use thereof, unless otherwise specifically prescribed in the Nonprofit Corporation Act [this article], shall not be mandatory.

History: 1953 Comp., § 51-14-133, enacted by Laws 1975, ch. 217, § 91; 1977, ch. 178, § 19.

### **§ 53-8-95. Greater voting requirements.**

Whenever, with respect to any action to be taken by the members or directors of a corporation, the articles of incorporation or bylaws require the vote or concurrence of a greater proportion of the directors or members or any class of members than required by the Nonprofit Corporation Act [this article], the provisions of the articles of incorporation or bylaws shall control.

History: 1953 Comp., § 51-14-134, enacted by Laws 1975, ch. 217, § 92.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 989 to 992; 18B Am. Jur. 2d Corporations § 1371.

### **§ 53-8-96. Waiver of notice.**

Whenever any notice is required to be given to any member or director of a corporation under the provisions of the Nonprofit Corporation Act [this article] or under the provisions of the articles of incorporation or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to the notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice.

History: 1953 Comp., § 51-14-135, enacted by Laws 1975, ch. 217, § 93.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 332.  
18 C.J.S. Corporations § 182.

### **§ 53-8-97. Action by members or directors without a meeting.**

A. Any action required by the Nonprofit Corporation Act [this article] to be taken at a meeting of the members or directors of a corporation, or any action which may be taken at a meeting of the members or directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all of the members entitled to vote with respect to the subject matter thereof, or all of the directors, as the case may be.

B. The consent as provided for in Subsection A of this section shall have the same force and effect as a unanimous vote and may be stated as such in any articles or document filed with the corporation commission under the Nonprofit Corporation Act.

History: 1953 Comp., § 51-14-136, enacted by Laws 1975, ch. 217, § 94.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 332.  
18 C.J.S. Corporations § 182.

## **§ 53-8-98. Unauthorized assumption of corporate powers.**

All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

History: 1953 Comp., § 51-14-137, enacted by Laws 1975, ch. 217, § 95.

## **§ 53-8-99. Effect of repeal of prior acts.**

The repeal of a prior act by the Nonprofit Corporation Act [this article] shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

History: 1953 Comp., § 51-14-138, enacted by Laws 1975, ch. 217, § 97.

Effective dates. - Laws 1975, ch. 217, § 100, makes the Nonprofit Corporation Act effective on July 1, 1976.

Severability clauses. - Laws 1975, ch. 217, § 99, provides for the severability of the act if any part or application thereof is held invalid.

# **Article 9**

## **Indian Pueblos**

### **§ 53-9-1. [Pueblo Indian communities; bodies corporate; powers.]**

The inhabitants within the state of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted bodies politic and corporate, and shall be known in the law by the name of the Pueblo de . . . . . . . . . ., (naming it), and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas and matters whatsoever, proper to recover, protect, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual.

History: Laws 1847, p. 35; C.L. 1865, ch. 66, § 1; C.L. 1884, § 1304; C.L. 1897, § 1875; Code 1915, § 2784; C.S. 1929, § 69-101; 1941 Comp., § 54-1601; 1953 Comp., § 51-17-1.

History of title held by Pueblo Indians. - The Pueblo Indians hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution, a title which was fully recognized by the Mexican government, and protected by it in the Treaty of Guadalupe Hidalgo, by which the country and the allegiance of its inhabitants were transferred to the United States. *United States v. Joseph*, 94 U.S. 614, 24 L. Ed. 295 (1876).

The Pueblo Indians became citizens of the United States by virtue of the Treaty of Guadalupe Hidalgo, which guaranteed their property rights equally with other citizens of New Mexico. They are a body corporate and have complete title to their lands which the courts protect the same as titles to other lands., *United States v. Varela*, 1 N.M. 593 (1874), *aff'd sub nom.*, *United States v. Joseph*, 94 U.S. 614, 24 L. Ed. 295 (1876).

The Indian tribes are distinct political entities, with the right to self-government, having exclusive authority within their territorial boundaries and are not subject to the laws of the state in which they are located nor to federal laws except where federal laws or the jurisdiction of courts is expressly conferred by federal legislation. *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Validity of "Kearny Code" and acts of 1847. - The system of laws known as the "Kearny Code," and the acts of the general assembly of New Mexico of the December session, 1847, were valid except so far as they attempted to confer political rights upon the inhabitants, under the constitution of the United States, the same having been established by competent authority by virtue of rights of war. *Ward v. Broadwell*, 1 N.M. 75 (1854).

Effect of this section. - This section gave the Indian pueblos the status of bodies politic and corporate and as such empowered them to sue in respect of their lands. *Garcia v. United States*, 43 F.2d 873 (10th Cir. 1930); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504 (1919).

This statute does not purport to vest any governmental powers, rights or duties in the Pueblos of New Mexico which are dependent Indian communities, Indian tribes, under the guardianship of the United States. *Toledo v. Pueblo De Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

Lands of the pueblo are subject to congressional control although held in communal fee-simple ownership by the Indians of each pueblo. *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913).

But pueblo still legal entity in court. - The existing wardship of the United States over the Indians of the Pueblo of Santa Rosa, in Arizona, acquired as a part of the territory of New Mexico by grant or concession, does not affect the pueblo as a legal entity in court. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504 (1919).

State jurisdiction over Indians. - Although congress did specifically act to give its consent to the state to assume jurisdiction over the Indians within its boundaries, such jurisdiction is prohibited until the state should amend its constitution or statute, removing any legal impediment to such assumption of jurisdiction. New Mexico has not seen fit to amend N.M. Const., art. XXI, § 2 and has not accepted jurisdiction over the Indians. *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Judicial jurisdiction over Indian tribe. - The district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off of the reservation as an unincorporated association, registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe. *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), cert. denied, U.S. , 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989).

Trespass on pueblo lands actionable. - One on the lands of the pueblo, without the consent of the inhabitants, may be ejected or punished civilly, by a suit for trespass, according to the laws regulating such matters in New Mexico. *United States v. Joseph*, 94 U.S. 614, 24 L. Ed. 295 (1876).

An Indian pueblo may acquire title by adverse possession. *Garcia v. United States*, 43 F.2d 873 (10th Cir. 1930).

Pueblos have right to alienate their lands. - Pueblo Indians in New Mexico were citizens of Mexico and at the time of the ratification of the Treaty of Guadalupe Hidalgo possessed all of the rights of any other citizen, including the right of alienation of their lands. *Territory v. Persons & Property Described in Delinquent Tax List*, 12 N.M. 139, 76 P. 307 (1904). See also *United States v. Lucero*, 1 N.M. 422 (1869); *United States v. Santistevan*, 1 N.M. 583 (1874).

And to use limitation statutes. - Indian pueblos were held entitled to the benefits of the New Mexico statutes of limitation which may be pleaded by the United States, as their guardian, in their behalf. *Garcia v. United States*, 43 F.2d 873 (10th Cir. 1930).

Pueblo lands taxable. - The lands of the Pueblo Indians in New Mexico are taxable. *Territory v. Persons & Property Described in Delinquent Tax List*, 12 N.M. 139, 76 P. 307 (1904).

But sales tax may not be levied. - The statutory definition of "federal area" in 4 U.S.C. § 105(a) was not intended to give the states or localities permission to levy a sales tax

upon Indian lands. *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

State court jurisdiction over divorce action between Indians of different pueblos proper where congress has remained silent upon the subject of divorce and it is not asserted that Pueblo customs and laws provide a remedy. *Tenorio v. Tenorio*, 44 N.M. 89, 98 P.2d 838 (1940).

But not where auto accident on pueblo. - The district court of Bernalillo county properly dismissed action by resident of Isleta Pueblo, New Mexico, against another resident thereof, for damages for automobile collision which occurred within an area embraced by Valencia county, New Mexico, for lack of jurisdiction, the Pueblo Indians of New Mexico being under the jurisdiction of the United States. The accident did not occur on land of the state of New Mexico and title to the land of the Isleta Pueblo was in the Indian tribe and had never been extinguished. *Valdez v. Johnson*, 68 N.M. 476, 362 P.2d 1004 (1961).

Pueblo actions not under color of state law. - The Pueblos do not derive their governmental powers from the state of New Mexico nor from the United States and consequently, there was no basis for holding that the conduct of the defendants (Pueblo civil authorities) of which the plaintiffs (Protestant Pueblo Indians) complain (allegedly subjecting plaintiffs to indignities, threats and reprisals because of their faith) was done under color of state law, statute, ordinance, regulation, custom or usage. *Toledo v. Pueblo De Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

Law reviews. - For article, "The Indian Tax Cases - A Territorial Analysis," see 9 N.M. L. Rev. 221 (1979).

## **Article 10**

### **Unincorporated Associations**

#### **§ 53-10-1. [Purpose of organization; filing statement, articles of association and rules and regulations with county clerk.]**

Whenever two or more persons shall desire to form an association for the promotion of their mutual pleasure or recreation of any hunting, fishing, camping, golf, country club, or association for a similar purpose, or an association not for the individual profit of the members thereof, and without incorporating the same as a corporation, or maintaining the title of its property in trust for the interest of its several members as they may exist from time to time.[, the] The said persons or members desiring to form such an association or club may file in the office of the county clerk of the county in which it may maintain its headquarters and pursue its objects and purposes, a statement containing the name of such association, its objects and purposes, the names and residences of

the persons forming such association, together with a copy of its articles of association and any rules and/or regulations governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein.

History: Laws 1937, ch. 186, § 1; 1941 Comp., § 52-101; 1953 Comp., § 51-18-1.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Associations and Clubs § 7. Club as inn or hotel, 19 A.L.R. 517; 53 A.L.R. 988.

Club, definition, 80 A.L.R. 1296; 143 A.L.R. 1381.

Solicitation of persons to join organization or society, or to pay membership fees or dues, validity, construction and application of statute or ordinance regarding, 167 A.L.R. 697.

Notice of meeting of voluntary association, 167 A.L.R. 1233.

Notice or hearing as affecting expulsion from professional association, 20 A.L.R.2d 540.

Liability of automobile bailee-club for loss of, or damage to, contents, 27 A.L.R.2d 815. 7 C.J.S. Associations § 3.

### **§ 53-10-2. [Property holdings; effect of member's death on termination of membership; member's interest not subject to execution.]**

Any such club or association may hold and acquire real or personal property by deed, lease or otherwise, in the name of such association by which it is known, and to [may] acquire title to any property by purchase or otherwise for its objects and purposes, which property shall be deemed in law to be held by the said club or association for the use and benefit of the actual and active members thereof composing said association from time to time,[:] and upon the decease of any member, or the termination of any membership therein, the interest of any deceased member, or the interest of any member whose membership is terminated, in the property real or personal of such association shall cease and terminate, without right of succession to the heirs, executors and administrators of such deceased member, or to the creditors or trustee in bankruptcy or assignee of any member whose membership in said association shall be terminated. The interest of any member in the real and personal property of any such club or association shall not be subject to execution as and for his debts or as his individual or special property.

History: Laws 1937, ch. 186, § 2; 1941 Comp., § 52-102; 1953 Comp., § 51-18-2.

Property in name of local chapters. - The local chapters of the Future Farmers of America are legally entitled to acquire and to hold both real or personal property in the name of the local chapter, and to convey or dispose of such property as is in accordance with such organization's by-laws or rules. 1961-62 Op. Att'y Gen. No. 61-96.

Issuance of tax deed to members of disbanded association. - Where defendants were the only remaining members of a voluntary association in good standing when it was disbanded, tax deed to land previously owned by the association, issued to them after its sale to the state for delinquent taxes, only effected a redemption of the land. Flanagan v. Benvie, 58 N.M. 525, 273 P.2d 381 (1954).

Rights of former members of disbanded association. - Where rifle club ceased to exist because there were no funds and only two members, the land owned by the association being sold to state for delinquent taxes, plaintiffs who did not belong to the association when land was acquired nor when the association disbanded had no right or interest in the land, nor did those who belonged to a subsequently organized club by the same name. Flanagan v. Benvie, 58 N.M. 525, 273 P.2d 381 (1954).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Associations and Clubs § 13. Status and rights of one renting room in club, 32 A.L.R. 1016. Golf club, resignation from, 99 A.L.R. 1441. Power and capacity of unincorporated association, lodge, society, or club to convey, transfer or encumber association property, 15 A.L.R.2d 1451. 7 C.J.S. Associations §§ 35, 36.

### **§ 53-10-3. [Mortgage or sale of property; method of conveyance.]**

The property, real, personal or leasehold interest therein of any such club or association may be mortgaged or sold at such time and upon such terms as the then members of such club or association may determine by vote as its rules or by-laws [bylaws] may prescribe; and any deed signed by the president or secretary, or such other officer or officers designated by resolution of the members of any such club or association adopted at any regular or special meeting called for that purpose, shall be deemed sufficient in law to convey the fee simple title, or any title, to any property held or possessed by any such club or association free and clear of any interest, claim or title of any of the individual members thereof, their heirs, executors and administrators, as tenants in common or otherwise.

History: Laws 1937, ch. 186, § 3; 1941 Comp., § 52-103; 1953 Comp., § 51-18-3.

Property in name of local chapters. - See same catchline in notes to 53-10-2 NMSA 1978.

### **§ 53-10-4. [Rules and regulations; subjects; effect.]**

The members of any such association or club formed under this act [53-10-1 to 53-10-8 NMSA 1978] may prescribe from time to time, rules and regulations for the government of said club or association as the majority of its members from time to time may determine, may prescribe what fees and dues shall be payable, and the time when the

same shall be paid as a condition for membership, or the continuance thereof by any member, and may provide in such rules that upon default in payment of such dues, or the violation of any of its other rules or regulations, a member's membership may be determined; which rules and regulations shall be deemed a contract between the member affected thereby and the balance of the members composing such association.

History: Laws 1937, ch. 186, § 4; 1941 Comp., § 52-104; 1953 Comp., § 51-18-4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Notice or hearing as affecting expulsion from social club or similar society, 20 A.L.R.2d 353.

Notice or hearing as affecting expulsion from professional association, 20 A.L.R.2d 540.

### **§ 53-10-5. [Right to sue and be sued; actions against members.]**

Such club or association may sue or be sued in its name without the individual members thereof being made parties to such suit, and may sue any member as a defendant in any matter arising out of his membership in said club or association or the termination thereof, and may recover judgment if necessary, for any dues or obligations due and owing by such member to the club or association, whether such member has ceased to become [be] such or not.

History: Laws 1937, ch. 186, § 5; 1941 Comp., § 52-105; 1953 Comp., § 51-18-5.

Individual liability of member. - Driver of truck was individually liable for injuries to woman struck by falling beam as truck was negligently moved in closing of refreshment stand operated exclusively by the ladies auxiliary. *Weese v. Stoddard*, 63 N.M. 20, 312 P.2d 545 (1957).

The members of an unincorporated association are liable for the torts committed by the association's agent acting within the scope of his employment. *Weese v. Stoddard*, 63 N.M. 20, 312 P.2d 545 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59 Am. Jur. 2d Parties §§ 19 to 23, 27, 30, 31.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions, 63 A.L.R. Fed. 361.

### **§ 53-10-6. Suits against or by unincorporated associations; recovery of judgments.**

A. An unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it any substantive right. Suit may be brought against an unincorporated association by any individual member of the association, and the

unincorporated association may sue its individual associates.

B. Any money judgment obtained against an unincorporated association shall bind only the joint or common property of the association.

C. In any action against an unincorporated association process may be served by delivering a copy of the summons and of the complaint or other pleading to an officer of the association or other head officer or agent in charge of its principal office in this state or by serving process in the manner now provided for service of process against corporations.

History: 1953 Comp., § 51-18-5.1, enacted by Laws 1959, ch. 68, § 1.

Class action allegations not necessary. - This section provides that unincorporated associations may be sued in their own name and the union defendants are sued as unincorporated labor organizations. Being sued in their own name, no allegations of a class action were necessary to make them defendants in this action. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

No substantive right against association. - Near the close of rodeo sponsored by an American Legion post, woman was injured by beam falling from truck when it was being moved by special servant at request of member of auxiliary. The driver of the truck was a special servant at the time of the accident, controlled by and acting under the direction of the auxiliary, an unincorporated association. He was assigned specifically by his post to do only the heavy work; other tasks were to be performed by the auxiliary. The stand was the exclusive project of the ladies who received all of the benefits. Legion post was not liable for the accident. *Weese v. Stoddard*, 63 N.M. 20, 312 P.2d 545 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Associations and Clubs § 52. Recovery by member from unincorporated association for injuries inflicted by tort of fellow member, 14 A.L.R.2d 473.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

Association of persons as proper representative of class under Rule 23 of Federal Rules of Civil Procedure governing maintenance of class actions, 63 A.L.R. Fed. 361.

7 C.J.S. Associations § 16.

### **§ 53-10-7. [Maximum term of existence; dissolution; distribution of proceeds of property.]**

Any association or club formed under the provisions of this act [53-10-1 to 53-10-8 NMSA 1978] may exist for such period of time not exceeding twenty years as may be fixed in the statement required to be filed by Section 1 [53-10-1 NMSA 1978] of this act; and upon the dissolution or winding up of any such club or association prior to the termination of its existence or otherwise, the property real and personal then possessed by said club, or any real estate the title to which is then standing in its name shall in law

be deemed to be held by the said club or association for the use and benefit of the members at the time of such dissolution, and upon a sale or disposition, the proceeds shall be distributed among the members of such club or association at the time of such dissolution.

History: Laws 1937, ch. 186, § 6; 1941 Comp., § 52-106; 1953 Comp., § 51-18-6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Associations and Clubs §§ 59, 60.

Right to assets of defunct or voluntarily dissolved club, 168 A.L.R. 956.

Right to assets of voluntarily dissolved lodge or club, 70 A.L.R.4th 897.

7 C.J.S. Associations § 9.

### **§ 53-10-8. [Construction of act.]**

This act [53-10-1 to 53-10-8 NMSA 1978] shall not be construed to repeal or modify any of the present laws of this state relative to corporations formed or [for] any purpose, but the same shall be construed as supplementary thereto.

History: Laws 1937, ch. 186, § 7; 1941 Comp., § 52-107; 1953 Comp., § 51-18-7.

Effective dates. - Laws 1937, ch. 186, contains no effective date provision, but was enacted at a session which adjourned on March 13, 1937. See N.M. Const., art. IV, § 23.

## **Article 11**

### **Business Corporations; Substantive Provisions**

#### **§ 53-11-1. Short title.**

Sections 53-11-1 through 53-18-12 NMSA 1978 is the general corporation law of New Mexico and may be cited as the "Business Corporation Act."

History: 1953 Comp., § 51-24-1, enacted by Laws 1967, ch. 81, § 1; 1977, ch. 103, § 9.

Cross-references. - For Professional Corporation Act, see 53-6-1 NMSA 1978 et seq. As to disposition of unclaimed property, see 7-8-1 NMSA 1978 et seq.

Compiler's notes. - This section is derived from Section 1 of the ABA Model Business Corporation Act.

Act inapplicable to corporation organized for banking. - The powers and authorities established for corporations by the Business Corporation Act, including the authority to issue preferred stock, would not apply to a corporation organized for the purpose of banking. 1979 Op. Att'y Gen. No. 79-6.

How corporation may be terminated. - A corporation being granted life by the act of a sovereign, that is by the act of the laws of the state wherein it is incorporated, nothing less than that power or the lapse of the period of life provided by the articles of incorporation or by the dissolution of the corporation by permission of the sovereignty can take that life away. 1953-54 Op. Att'y Gen. No. 5723 (rendered under former law).

Consideration of stockholder's Indian ethnicity in assessing taxes. - Incorporation by the taxpayer will not preclude consideration of the Indian ethnicity of its stockholders in determining the correctness of the bureau of revenue's assessments. *Eastern Navajo Indus., Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), 430 U.S. 959, 97 S. Ct. 1610, 51 L. Ed. 2d 810 (1977).

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 *Nat. Resources J.* 303 (1961).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 *N.M.L. Rev.* 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 *N.M.L. Rev.* 253 (1987).

## **§ 53-11-2. Definitions.**

As used in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], unless the text otherwise requires:

A. "corporation" or "domestic corporation" means a corporation for profit subject to the provisions of the Business Corporation Act, except a foreign corporation;

B. "foreign corporation" means a corporation for profit organized under laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under the Business Corporation Act;

C. "articles of incorporation" means the original or restated articles of incorporation or articles of consolidation and all amendments thereto including articles of merger;

D. "shares" means the units into which the proprietary interests in a corporation are divided;

E. "subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation;

F. "shareholder" means one who is a holder of record of shares in a corporation;

G. "authorized shares" means the shares of all classes which the corporation is authorized to issue;

H. "annual report" means the corporate report required by the Corporate Reports Act [53-5-1 to 53-5-9 NMSA 1978];

I. "distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness, by a corporation to or for the benefit of any of its shareholders in respect of any of its shares, whether by dividend or by purchase redemption or other acquisition of its shares, or otherwise;

J. "franchise tax" means the franchise tax imposed by the Franchise Tax Act;

K. "fees" means the fees imposed by Section 53-2-1 NMSA 1978;

L. "commission" means the state corporation commission or its delegate;

M. "address" means:

(1) the mailing address and the street address, if within a municipality; or

(2) the mailing address and a rural route number and box number, if any, or the geographical location, using well-known landmarks, if outside a municipality;

N. "duplicate original" means a document which is signed or executed in duplicate;

O. "delivery" means:

(1) if personally served, the date on which the documentation is received by the commission's corporation department; and

(2) if mailed, the date of the postmark plus three days, upon proof thereof by the party delivering the documentation; and

P. "person" includes individuals, partnerships, corporations and other associations.

History: 1953 Comp., § 51-24-2, enacted by Laws 1967, ch. 81, § 2; 1975, ch. 64, § 1; 1977, ch. 103, § 10; 1983, ch. 304, § 21; 1989, ch. 385, § 1.

The 1983 amendment redesignated former Subsections O to T as present Subsections H and J to N, respectively, added present Subsections I and O, deleted former Subsections H to N, which concerned the terms "treasury shares," "net assets," "stated capital," "surplus," "earned surplus," "capital surplus," and "insolvent", substituted

"corporate" for "annual" in Subsection H, substituted "the Franchise Tax Act" for "Article 3 of Chapter 53 NMSA 1978" at the end of Subsection J, added "or its delegate" at the end of Subsection L, and deleted "and" at the end of Subsection M.

The 1989 amendment, effective June 16, 1989, substituted the present provisions of Subsection M for "address means a recitation of the mailing address or post office box number and the street address, if within a municipality, or a description of the geographical location, if outside a municipality"; and added Subsection P.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 2 of the ABA Model Business Corporation Act.

Franchise Tax Act. - See 53-3-11 NMSA 1978 and notes thereto.

Franchise Tax Act. - The Franchise Tax Act, referred to in Subsection J, appeared as 53-3-11 to 53-3-32 NMSA 1978 but was repealed by Laws 1986, ch. 20, § 136D. For present comparable provisions, see the Corporate Income and Franchise Tax Act, which appears as Chapter 7, Article 2A NMSA 1978.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

Change of legal domicile only. - Where the corporation name, its principal address, the nature of the business conducted, the assets and the shareholders will remain the same and the only change is one of legal domicile, the new corporation will not be required to apply for certificates of title to the vehicles and will not have to pay the one percent excise tax. 1957-58 Op. Att'y Gen. No. 57-5 (rendered under former law).

Foreign Massachusetts or business trust not required to procure certificate of authority as a foreign corporation before transacting business in the state. 1970 Op. Att'y Gen. No. 70-104.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

### **§ 53-11-3. Purposes.**

Corporations may be organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for any lawful purpose or purposes, except banking, insurance, credit unions, savings and loan associations, railroads and waterworks organized under the Laws of 1887, Chapter 12.

History: 1953 Comp., § 51-24-3, enacted by Laws 1967, ch. 81, § 3.

Compiler's notes. - Laws 1887, ch. 12, referred to in this section, is compiled as 62-2-1 to 62-2-15, 62-2-17 to 62-2-19, 62-2-21 and 62-2-22 NMSA 1978.

This section is derived from Section 3 of the ABA Model Business Corporation Act.

Statute not for incorporation of savings bank. - If the purpose, or one of the purposes, of incorporating is to operate a savings bank, this statute is not available. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956) (decided under 51-2-6, 1953 Comp., now repealed).

No banking business under general corporation laws. - A corporation cannot organize under the general corporation laws and thereafter conduct a banking business whether or not said corporation has two departments. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956) (decided under 51-2-6, 1953 Comp., now repealed).

Law reviews. - For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 192 to 198, 204.

18 C.J.S. Corporations § 47.

### **§ 53-11-4. General powers.**

Each corporation has power to:

A. have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation;

B. sue and be sued, complain and defend, in its corporate name;

C. have a corporate seal which may be altered at pleasure, and to use the seal by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced, but failure to have or to affix a corporate seal does not affect the validity of any instrument, or any action taken in pursuance thereof or in reliance thereon;

D. purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated;

E. sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

F. lend money to, and otherwise assist, its employees, officers and directors;

G. purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, limited partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

H. make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income;

I. lend money for its corporate purposes, invest and reinvest its funds and take and hold real and personal property as security for the payment of funds so loaned or invested;

J. conduct its business, carry on its operations, have offices and exercise the powers granted by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] within or without this state;

K. elect or appoint directors, officers and agents of the corporation, and define their duties and fix their compensation;

L. make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation;

M. make donations for the public welfare or for charitable, scientific, educational or governmental purposes;

N. transact any lawful business in aid of governmental policy;

O. pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, stock option plans and other incentive plans for any or all of its directors, officers and employees;

P. be a promoter, partner, member, associate, trustee or manager of any partnership, joint venture, trust or other enterprise;

Q. resist a change or potential change in control of the corporation if the directors by a majority vote of a quorum determine that the change or potential change is opposed to or not in the best interest of the corporation upon consideration of the interests of the corporation's shareholders and any of the matters set forth in Subsection D of Section 53-11-35 NMSA 1978; and

R. have and exercise all powers necessary or convenient to effect its purposes.

History: 1953 Comp., § 51-24-4, enacted by Laws 1967, ch. 81, § 4; 1975, ch. 64, § 2; 1983, ch. 304, § 22; 1987, ch. 238, § 8.

The 1983 amendment redesignated former Subsections P to R as present Subsections O to Q, respectively, and deleted former Subsection O, which concerned the power to indemnify directors or officers of corporations.

The 1987 amendment, effective April 9, 1987, added Subsection Q, redesignated former Subsection Q as Subsection R, and deleted "and" from the end of Subsection P.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 4 of the ABA Model Business Corporation Act.

Rule of limited liability. - Normally the corporation is an insulator from liability on claims of creditors, and the fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched and huge sums of capital attracted. *Scott Graphics, Inc. v. Mahaney*, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

Determination that shareholders are alter egos of corporation. - Generally, the determination that shareholders are the alter egos of the corporation describes the specific situation where the shareholders have so manipulated the corporation to further their own individual interests that the identity of the corporation has merged into its shareholders, that is, where the two have, in fact, become so closely identified that a court in ruling that the corporate entity should be disregarded is merely recognizing reality. *Scott Graphics, Inc. v. Mahaney*, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

Corporate entity disregarded when used for fraud or injustice. - The corporate entity should be recognized and supported; however, it will be disregarded by the courts when the corporation is used to perpetrate fraud or promote injustice. *Scott Graphics, Inc. v. Mahaney*, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

But disregard of formalities and ignorance of directors not enough. - Disregard of corporate formality in the operation of a corporation and considerable ignorance on the part of the directors and officers as to its operation in and of themselves were not enough to warrant disregarding the corporate entity, and there was no evidence of fraud

or injustice. *Scott Graphics, Inc. v. Mahaney*, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1990 to 2123.

Right of business corporation to use its funds or property for humanitarian purposes, 3 A.L.R. 443.

Power of corporation to execute trust involving a determination regarding the personal conduct or needs of beneficiaries, 11 A.L.R. 300.

Power of corporation to pass title to real property held in excess of corporate powers, 37 A.L.R. 204; 62 A.L.R. 494.

Corporation's right to sue on contract made by promoters before organization, 66 A.L.R. 1425.

Constitutionality, construction, and effect of statutory or charter provisions relating to the sale of all or substantially all of the assets of corporation or division or distribution of proceeds, 79 A.L.R. 624.

Assumption of mortgage as ultra vires, 91 A.L.R. 177.

Power of corporation to change obligations to stockholders, 105 A.L.R. 1452; 117 A.L.R. 1290.

Power of corporation to enforce a contract made after taking the steps necessary to put its corporate existence beyond collateral attack, as affected by limited amount of capital subscribed or paid in, 128 A.L.R. 874.

Power of corporation or its officers with respect to payment of bonus or pension to officers or employees, 164 A.L.R. 1125.

Right of corporation to engage in business, trade, or activity requiring license from public, 165 A.L.R. 1098.

Corporation's power with respect to payment of remuneration, bonus, and the like to widow or family of deceased officer, 29 A.L.R.2d 1262.

Corporation's power to contract for indemnification for attorneys' fees and other expenses incident to controversy respecting internal affairs of the corporation, 39 A.L.R.2d 594.

Corporation's power to donate to a charitable or similar institution, 39 A.L.R.2d 1195.

Corporation's power to enter into partnership or joint venture, 60 A.L.R.2d 917.

19 C.J.S. Corporations §§ 933 to 1259.

### **§ 53-11-4.1. Indemnification of directors and officers.**

A. As used in this section:

(1) "director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation or nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust;

(2) "corporation" includes any domestic or foreign predecessor entity of the corporation in a merger, consolidation or other transaction in which the predecessor's existence ceased upon consummation of such transaction;

(3) "expenses" include attorneys' fees;

(4) "official capacity" means:

(a) when used with respect to a director, the office of director in the corporation; and

(b) when used with respect to a person other than a director, as contemplated in Subsection I of this section, the elective or appointive office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the corporation, but in each case does not include service for any other foreign or domestic corporation or nonprofit corporation, or any cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust;

(5) "party" includes a person who was, is or is threatened to be made, a named defendant or respondent in a proceeding; and

(6) "proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative.

B. A corporation shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a director if:

(1) the person acted in good faith;

(2) the person reasonably believed:

(a) in the case of conduct in the person's official capacity with the corporation, that the person's conduct was in its best interests; and

(b) in all other cases, that the person's conduct was at least not opposed to its best interests; and

(3) in the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful. Indemnification may be made against judgments, penalties, fines, settlements and reasonable expenses, actually incurred by the person in connection with the proceeding; except that if the proceeding was by or in the right of the corporation, indemnification may be made only against such reasonable expenses and shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the corporation. The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person did not meet the requisite standard of conduct set forth in this subsection.

C. A director shall not be indemnified under Subsection B of this section in respect of any proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director shall have been adjudged to be liable on the basis that personal benefit was improperly received by the director.

D. Unless limited by the articles of incorporation:

(1) a director who, in the opinion of the board of directors reasonably based on the facts, circumstances and outcome of the proceeding, has been wholly successful, on the merits or otherwise, in the defense of any proceeding referred to in Subsection B of this section shall be indemnified against reasonable expenses incurred by the director in connection with the proceeding; or

(2) a court of appropriate jurisdiction, upon application of a director and such notice as the court shall require, shall have authority to order indemnification in the following circumstances:

(a) if it determines a director is entitled to reimbursement under Paragraph (1) of this subsection, the court shall order indemnification, in which case the director shall also be entitled to recover the reasonable expenses of securing such reimbursement; or

(b) if it determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director has met the standard of conduct set forth in Subsection B of this section or has been adjudged liable in the circumstances described in Subsection C of this section. The court may order such indemnification except that indemnification with respect to any proceeding by or in the right of the corporation or in which liability shall have been adjudged in the circumstances described in Subsection C of this section shall be limited to reasonable expenses. A court of appropriate jurisdiction may be the same court in which the proceeding involving the director's liability took place.

E. No indemnification under Subsection B of this section shall be made by the corporation unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the

director has met the standard of conduct set forth in Subsection B of this section. Such determination shall be made:

(1) by the board of directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) if such a quorum cannot be obtained, by a majority vote of a committee of the board duly designated to act in the matter by a majority vote of the full board, in which designation directors who are parties may participate, and consisting solely of two or more directors not at the time parties to the proceeding;

(3) by special legal counsel, selected by the board of directors or a committee thereof by vote as set forth in Paragraph (1) or (2) of this subsection or, if the requisite quorum of the full board cannot be obtained therefor and such committee cannot be established, by a majority vote of the full board, in which selection directors who are parties may participate; or

(4) by the shareholders.

Authorization of indemnification and determination as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses shall be made in a manner specified in Paragraph (3) of Subsection E of this section for the selection of such counsel. Shares held by directors who are parties to the proceeding shall not be voted on the subject matter under this subsection.

F. Reasonable expenses incurred by a director who is a party to a proceeding may be paid or reimbursed by the corporation in advance of the final disposition of such proceeding if:

(1) the director furnishes the corporation a written affirmation of his good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation as authorized in this section;

(2) the director furnishes the corporation a written undertaking by or on behalf of the director to repay such amount if it shall ultimately be determined that the director has not met such standards of conduct; and

(3) a determination is made that the facts then known to those making the determination would not preclude indemnification under this section.

The undertaking required by Paragraph (2) of this subsection shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment. Determinations and authorizations of

payments under this subsection shall be made in the manner specified in Subsection E of this section.

G. The indemnification authorized by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under the articles of incorporation, the bylaws, an agreement, a resolution of shareholders or directors or otherwise, both as to action in an official capacity and as to action in another capacity while holding such office, shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

H. For purposes of this section, the corporation shall be deemed to have requested a director to serve an employee benefit plan whenever the performance by the director of duties to the corporation also imposes duties on, or otherwise involves services by, the director to the plan or participants or beneficiaries of the plan; excise taxes assessed on a director with respect to an employee benefit plan pursuant to applicable law shall be deemed "fines"; and action taken or omitted by the director with respect to an employee benefit plan in the performance of duties for a purpose reasonably believed by the director to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose which is not opposed to the best interests of the corporation.

I. Unless limited by the articles of incorporation:

(1) an officer of the corporation shall be indemnified as and to the same extent provided in Subsection D of this section for a director and shall be entitled to the same extent as a director to seek indemnification pursuant to the provisions of that subsection;

(2) a corporation shall have the power to indemnify and to advance reasonable expenses to an officer, employee or agent of the corporation to the same extent that it may indemnify and advance reasonable expenses to directors pursuant to this section; and

(3) a corporation, in addition, shall have the power to indemnify and to advance reasonable expenses to an officer, employee or agent who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

J. A corporation shall have power to purchase and maintain insurance or furnish similar protection, including but not limited to providing a trust fund, a letter of credit or self-insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation or nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust, against any liability asserted against and

incurred by the person in any such capacity or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against such liability under the provisions of this section.

K. Any indemnification of, or advance of expenses to, a director in accordance with this section, if arising out of a proceeding by or in the right of the corporation, shall be reported in writing to the shareholders with or before the notice of the next shareholders' meeting.

History: 1978 Comp., § 53-11-4.1, enacted by Laws 1983, ch. 304, § 23; 1987, ch. 238, § 9.

The 1987 amendment, effective April 9, 1987, substituted "other incorporated or unincorporated enterprise or employee benefit plan or trust" for "other enterprise or employee benefit plan" throughout the section; inserted "reasonable" preceding "expenses" throughout the section; in Subsection A(1), inserted "or nonprofit corporation, cooperative"; in Subsection A(4)(b), inserted "or nonprofit corporation, or any cooperative"; in Subsection D(1), substituted "in the opinion of the board of directors" for "in the board of director's opinion"; in Subsection D(2)(b), inserted "except that indemnification" in the second sentence; in Subsection F, substituted "final disposition of such proceeding if" for "final disposition of such proceeding upon receipt by the corporation of"; in Subsections F(1) and (2), inserted "the director furnishes the corporation" at the beginning; designated part of former Subsection F(2) as present Subsection F(3); in the next-to-last sentence in Subsection F, substituted "Paragraph (2) of this subsection" for "this Paragraph"; substituted present Subsection G for the former provisions of that subsection as set out in the 1983 Replacement Pamphlet; and in Subsection J, inserted "or furnished similar protection, including but not limited to providing a trust fund, a letter of credit or self-insurance" near the beginning and inserted "or nonprofit corporation, cooperative" near the middle of the subsection.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-11-5. Power of corporation to acquire its own shares.**

A. A corporation shall have the power to acquire its own shares. All of its own shares acquired by a corporation shall, upon acquisition, constitute authorized but unissued shares, unless the articles of incorporation provide that they shall not be reissued, in which case the authorized shares shall be reduced by the number of shares acquired.

B. If the number of authorized shares is reduced by an acquisition, the corporation shall, on or before the time for filing its next corporate report under the Corporate Reports Act with the commission, file a statement of reduction showing the reduction in the authorized shares. The statement of reduction shall be executed by the corporation by

an officer of the corporation and verified by the officer signing such statement, and shall set forth:

- (1) the name of the corporation;
- (2) the number of acquired shares reduced, itemized by classes and series; and
- (3) the aggregate number of authorized shares, itemized by classes and series, after giving effect to such reduction.

History: 1953 Comp., § 51-24-5, enacted by Laws 1967, ch. 81, § 5; 1983, ch. 304, § 24.

The 1983 amendment rewrote this section to the extent that a detailed comparison would be impracticable.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 6 of the ABA Model Business Corporation Act.

Corporate Reports Act. - See 53-5-1 NMSA 1978 and notes thereto.

Corporation purchase of own stock. - Corporation may purchase its own stock, keep it alive and treat it as an asset on its books, free of conditions, limitations or reservations. *Woodson v. Lee*, 73 N.M. 425, 389 P.2d 196 (1963) (decided under former law).

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 2061 to 2076.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 A.L.R. 315.  
19 C.J.S. Corporations § 950.

### **§ 53-11-6. Defense of ultra vires.**

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation is invalid because the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

A. in a proceeding by a shareholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of the contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of the contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

B. in a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation; or

C. in a proceeding by the attorney general, as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from the transaction of unauthorized business.

History: 1953 Comp., § 51-24-6, enacted by Laws 1967, ch. 81, § 6.

Compiler's notes. - This section is derived from Section 7 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 2009 to 2033.

19 C.J.S. Corporations § 970.

### **§ 53-11-7. Corporate name.**

A. The corporate name shall:

(1) contain the separate word "corporation," "company," "incorporated" or "limited" or shall contain a separate abbreviation of one of these words;

(2) not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation; and

(3) not be the same as, or confusingly similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in

the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], or the name of a corporation which has in effect a registration of its corporate name as provided in the Business Corporation Act.

B. Paragraph (3) of Subsection A of this section shall not apply if the applicant files with the commission either:

(1) the written consent of such other corporation or holder of a reserved or registered name to use the same or confusingly similar name and one or more words are added to make the name distinguishable from the other name; or

(2) a certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of the name in this state.

History: 1953 Comp., § 51-24-7, enacted by Laws 1967, ch. 81, § 7; 1975, ch. 64, § 3; 1983, ch. 304, § 25.

The 1983 amendment inserted "separate" in two places in Paragraph (1) of Subsection A.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 8 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 273, 277, 283, 284, 286 to 299.

What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence, 5 A.L.R. 1580.

Corporation doing business and making contracts under assumed name, 56 A.L.R. 450.

Validity and construction of constitutional or statutory provisions which prohibit the use by a corporation or partnership, as a part of its name, of certain described words giving the impression that it is subject to governmental control, 63 A.L.R. 1049.

Use of abbreviations of name of municipal body or private corporation in designating party to judicial proceedings, 167 A.L.R. 1217.

18 C.J.S. Corporations §§ 164 to 169.

## **§ 53-11-8. Reserved name.**

A. The exclusive right to the use of a corporate name may be reserved by:

(1) any person intending to organize a corporation under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978];

(2) any domestic corporation intending to change its name;

(3) any foreign corporation intending to make application for a certificate of authority to transact business in this state;

(4) any foreign corporation authorized to transact business in this state and intending to change its name; or

(5) any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this state.

B. The reservation shall be made by filing with the commission an application to reserve a specified corporate name, executed by the applicant. If the commission finds that the name is available for corporate use, it shall reserve the name for the exclusive use of the applicant for a period of one hundred and twenty days.

C. The right to the exclusive use of a specified corporate name so reserved may be transferred to any other person or corporation by filing in the office of the commission a notice of transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee.

History: 1953 Comp., § 51-24-8, enacted by Laws 1967, ch. 81, § 8.

Compiler's notes. - This section is derived from Section 9 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 289 to 293.

Right to protection of corporate name as between domestic corporation and foreign corporation not qualified to do business in state, 26 A.L.R.3d 994.

Protection of business or trading corporation against use of same or similar name by another corporation, 72 A.L.R.3d 8.

18 C.J.S. Corporations §§ 165, 168.

### **§ 53-11-9. Registered name.**

A. Any foreign corporation not authorized to transact business in this state may register its corporate name under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] if its corporate name is not the same as, or confusingly similar to, the name of any domestic corporation existing under the laws of this state, or the name of any foreign

corporation authorized to transact business in this state, or any corporate name reserved or registered under the Business Corporation Act.

B. Registration shall be made by:

(1) filing with the commission:

(a) an application for registration executed by the corporation by an officer thereof, setting forth the name of the corporation, the state or territory under the laws of which it is incorporated, the date of its incorporation, a statement that it is carrying on or doing business, and a brief statement of the business in which it is engaged; and

(b) a certificate setting forth that the corporation is in good standing under the laws of the state or territory in which it is organized, executed by the secretary of state of the state or territory or by the official who may have custody of the records pertaining to corporations; and

(2) paying to the commission a registration fee in the amount of one dollar (\$1.00) for each month, or fraction thereof, between the date of filing the application and December 31 of the calendar year in which the application is filed.

C. Registration shall be effective until the close of the calendar year in which the application for registration is filed.

History: 1953 Comp., § 51-24-9, enacted by Laws 1967, ch. 81, § 9.

Compiler's notes. - This section is derived from Section 10 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 289 to 293.

Right to protection of corporate name as between domestic corporation and foreign corporation not qualified to do business in state, 26 A.L.R.3d 994.

18 C.J.S. Corporations §§ 168, 173.

### **§ 53-11-10. Renewal of registered name.**

A corporation which has in effect a registration of its corporate name, may renew the registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration and a certificate of good standing as required for the original registration and by paying a fee of ten dollars (\$10.00). A renewal application may be filed between October 1 and December 31 each year, and shall extend the registration for the following calendar year.

History: 1953 Comp., § 51-24-10, enacted by Laws 1967, ch. 81, § 10.

Compiler's notes. - This section is derived from Section 11 of the ABA Model Business Corporation Act.

### **§ 53-11-11. Registered office and registered agent.**

Each corporation shall have and continuously maintain in this state:

A. a registered office which may be, but need not be, the same as its place of business; and

B. a registered agent, which agent may be either an individual resident in this state whose business office is identical with the registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with the registered office.

History: 1953 Comp., § 51-24-11, enacted by Laws 1967, ch. 81, § 11.

Compiler's notes. - This section is derived from Section 12 of the ABA Model Business Corporation Act.

### **§ 53-11-12. Failure to appoint and maintain registered agent; penalty.**

If any corporation fails for a period of thirty days to appoint and maintain a registered agent in this state or has failed for thirty days after change of its registered office or registered agent to file in the office of the commission a statement of the change, the commission shall notify the corporation of its delinquency by certified letter to the corporation's principal office. If the delinquency is not corrected within thirty days from the date the letter is transmitted, the commission may commence proceedings to strike the names and records of the delinquent corporation from the files of the commission after proceedings held pursuant to the terms of this section. The commission shall issue a notice of dissolution and setting [set] a date for hearing. Service of process and notice of proceedings shall be by certified mail to the principal place of business of the corporation. Any order of the commission may be appealed to the district court of Santa Fe county, New Mexico within sixty days of the date it was issued by the commission.

History: 1953 Comp., § 51-24-11.1, enacted by Laws 1967, ch. 252, § 3.

Compiler's notes. - This section is not a part of the ABA Model Business Corporation Act.

### **§ 53-11-13. Change of registered office or registered agent.**

A. A corporation may change its registered office or change its registered agent, or both, upon filing in the office of the commission a statement setting forth:

(1) the name of the corporation;

(2) the address of its then registered office;

(3) if the address of its registered office is to be changed, the address to which the registered office is to be changed;

(4) the name of its then registered agent;

(5) if its registered agent is to be changed:

(a) the name of its successor registered agent; and

(b) an affidavit executed by the successor registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the successor registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation; and

(6) that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

B. The statement shall be executed by the corporation by its president or a vice president, and verified by him, and delivered to the commission. If the commission finds that the statement conforms to the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], it shall file the statement in its office and, upon such filing the change of address of the registered office or the appointment of a new registered agent, or both, as the case may be, becomes effective, and upon filing fulfills the requirement to file a supplemental report under Section 53-5-5 NMSA 1978.

C. Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the commission, which shall forthwith mail a copy thereof to the corporation at its principal place of business as shown on the records of the commission. The appointment of such agent shall terminate upon the expiration of thirty days after receipt of the notice by the commission.

D. If a registered agent changes his or its business address to another place within the same county, he or it may change such address and the address of the registered office of any corporation of which he or it is the registered agent by filing a statement as

required by this section except that it need be signed only by the registered agent and need not be responsive to Paragraph (5) of Subsection A of this section and must recite that a copy of the statement has been mailed to the corporation.

History: 1953 Comp., § 51-24-12, enacted by Laws 1967, ch. 81, § 12; 1975, ch. 64, § 4; 1977, ch. 103, § 11.

Compiler's notes. - This section is derived from Section 13 of the ABA Model Business Corporation Act.

### **§ 53-11-14. Service of process on corporation.**

The registered agent appointed by a corporation shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served. Nothing in this section limits or affects the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

History: 1953 Comp., § 51-24-13, enacted by Laws 1967, ch. 81, § 13.

Cross-references. - For service of process on secretary of state, see 38-1-5 NMSA 1978.

Compiler's notes. - This section is derived from Section 14 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2192, 2194.

What suits at domicile of corporation involving corporate stock, or rights and obligations incident thereto, are in rem, jurisdiction of which may rest on constructive service of process against nonresident, 145 A.L.R. 1393.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Service in absence of express statutory direction on dissolved domestic corporation, 75 A.L.R.2d 1399.

19 C.J.S. Corporations §§ 1312, 1314.

### **§ 53-11-15. Authorized shares.**

A. Each corporation has power to create and issue the number of shares stated in its articles of incorporation. The shares may be divided into one or more classes with the designation, preferences, limitations and relative rights stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of, or provide special voting rights for, the shares of any class to the extent not inconsistent

with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

B. Without limiting the authority granted in this section, a corporation, when so provided in its articles of incorporation, may issue shares of preferred or special classes:

(1) subject to the right of the corporation to redeem any of the shares at the price fixed by the articles of incorporation for the redemption thereof;

(2) entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends;

(3) having preference over any other class or classes of shares as to the payment of dividends;

(4) having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation; or

(5) convertible into shares of any other class or into shares of any series of the same or any other class, except a class having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation.

History: 1953 Comp., § 51-24-14, enacted by Laws 1967, ch. 81, § 14; 1975, ch. 64, § 5; 1983, ch. 304, § 26.

The 1983 amendment in the second sentence of Subsection A deleted "any or all of which classes may consist of shares with par value or shares without par value," following "classes" and substituted "designation" for "designations" and at the end of Subsection B(5) deleted "but shares without par value shall not be converted into shares with par value unless that part of the stated capital of the corporation represented by such shares without par value is, at the time of conversion, at least equal to the aggregate par value of the shares into which the shares without par value are to be converted or the amount of any such deficiency is transferred from surplus to stated capital."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 15 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 431 to 445, 463.

Rights of holders of preferred stock in respect of dividends, 6 A.L.R. 802; 67 A.L.R. 765; 98 A.L.R. 1526; 133 A.L.R. 653.

Nonpar stock, 19 A.L.R. 131; 36 A.L.R. 791; 45 A.L.R. 1501; 65 A.L.R. 1347.

Power of corporation to change obligations to stockholders, 105 A.L.R. 1452; 117 A.L.R. 1290.

Validity of cancellation of accrued dividends on preferred corporate stock, 8 A.L.R.2d 893.

Statutory requirements respecting issuance of corporate stock as applicable to foreign corporations, 8 A.L.R.2d 1185.

Rights of preferred stockholders as to passed or accumulated dividends in going concern, 27 A.L.R.2d 1073.

Meaning of "book value" of corporate stock, 51 A.L.R.2d 606.

Failure to issue stock as factor in disregard of corporate entity, 8 A.L.R.3d 1122.

Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

18 C.J.S. Corporations §§ 192 to 198, 215 to 222.

### **§ 53-11-15.1. Shares held for account.**

If the articles of incorporation or the bylaws so provide, the board of directors may adopt by resolution a procedure whereby a shareholder of the corporation may certify in writing to the corporation that all or a portion of the shares registered in the name of such shareholder are held for the account of a specified person or persons. The resolution shall set forth:

A. the classification of shareholder who may certify;

B. the purpose or purposes for which the certification may be made;

C. the form of certification and information to be contained therein;

D. if the certification is with respect to a record date or closing of the stock transfer books within which the certification must be received by the corporation; and

E. such other provisions with respect to the procedure as are deemed necessary or desirable. Upon receipt by the corporation of a certification complying with the procedure, the persons specified in the certification shall be deemed, for the purpose or purposes set forth in the certification, to be the holders of record of the number of shares specified in place of the shareholder making the certification.

History: 1978 Comp., § 53-11-15.1, enacted by Laws 1983, ch. 304, § 27.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

## **§ 53-11-16. Issuance of shares of preferred or special classes in series.**

A. If the articles of incorporation so provide, the shares of any preferred or special class may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes. Any or all of the series of any such class and the variations in the relative rights and preferences as between different series may be fixed and determined by the articles of incorporation, but all shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

- (1) the rate of dividend;
- (2) whether shares may be redeemed and, if so, the redemption price and the terms and conditions of redemption;
- (3) the amount payable upon shares in event of voluntary and involuntary liquidation;
- (4) sinking fund provisions, if any, for the redemption or purchase of shares;
- (5) the terms and conditions, if any, on which shares may be converted; and
- (6) voting rights, if any.

B. If the articles of incorporation expressly vest authority in the board of directors, then to the extent that the articles of incorporation have not established series and fixed and determined the variations in the relative rights and preferences as between series, the board of directors may divide any or all of such classes into series and, within the limitations set forth in this section and in the articles of incorporation, fix and determine the relative rights and preferences of the shares of any series so established.

C. In order for the board of directors to establish a series, where authority to do so is contained in the articles of incorporation, the board of directors shall adopt a resolution setting forth the designation of the series and fixing and determining the relative rights and preferences thereof, or so much thereof as are not fixed and determined by the articles of incorporation.

D. Prior to the issue of any shares of a series established by resolution adopted by the board of directors, the corporation shall file in the office of the commission a statement setting forth:

- (1) the name of the corporation;
- (2) a copy of the resolution establishing and designating the series, and fixing and

determining the relative rights and preferences thereof;

(3) the date of adoption of the resolution; and

(4) that the resolution was duly adopted by the board of directors.

E. Such statement shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one of the officers signing the statement, and shall be delivered to the commission. If the commission finds that the statement conforms to law, it shall, when all fees have been paid:

(1) endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing thereof;

(2) file one of the duplicate originals in its office; and

(3) return the other duplicate original to the corporation or its representative.

F. Upon the filing of such statement by the commission, the resolution establishing and designating the series and fixing and determining the relative rights and preferences thereof shall become effective and constitute an amendment of the articles of incorporation.

History: 1953 Comp., § 51-24-15, enacted by Laws 1967, ch. 81, § 15; 1975, ch. 64, § 6; 1983, ch. 304, § 28.

The 1983 amendment deleted "franchise taxes and" preceding "fees" in the last sentence of the introductory language of Subsection E.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 16 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

### **§ 53-11-17. Subscriptions for shares.**

A subscription for shares of a corporation to be organized shall be irrevocable for a period of six months, unless otherwise provided by the terms of the subscription agreement or unless all of the subscribers consent to the revocation of the subscription.

Unless otherwise provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as determined by the board of directors. Any call made by the board of directors for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be. In case of default in the payment of any installment or call when the payment is due, the corporation may proceed to collect the amount due in the same manner as any debt due the corporation. The bylaws may prescribe other penalties for failure to pay installments or calls that may become due, but no penalty working a forfeiture of a subscription, or of the amounts paid thereon, shall be declared as against any subscriber unless the amount due thereon remains unpaid for a period of thirty days after written demand has been made therefor. If mailed, the written demand shall be deemed to be made when deposited in the United States mail in a sealed envelope addressed to the subscriber at his last post-office address known to the corporation, with postage thereon prepaid. In the event of the sale of any shares by reason of any forfeiture, the excess of proceeds realized over the amount due and unpaid on the shares shall be paid to the delinquent subscriber or to his legal representative.

History: 1953 Comp., § 51-24-16, enacted by Laws 1967, ch. 81, § 16.

Compiler's notes. - This section is derived from Section 17 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 578 to 581, 583.

Shares of corporate stock as subject of execution or attachment, 1 A.L.R. 653.

Bona fide holder of negotiable paper given in payment of a subscription to corporate stock in violation of law, 4 A.L.R. 1330.

Liability upon stock subscription payable in services which are rendered unnecessary by the insolvency of corporation, or other cause, 6 A.L.R. 277.

Right of creditor of insolvent corporation to sue stockholder at law upon unpaid subscription, 7 A.L.R. 100.

Liability on unpaid subscription, of transferees of stock issued in exchange for property or services at an overvaluation, 12 A.L.R. 449.

Liability to creditors of stockholders whose stock is forfeited or sold for nonpayment of assessments, 19 A.L.R. 1096.

Payment of stock subscriptions in good will, 24 A.L.R. 1285.

Constructive notice to purchaser or pledgee of stock of corporation's lien thereon, 33 A.L.R. 1272.

When does statute of limitations begin to run against an action by, or in behalf of, creditors of a corporation on unpaid stock or subscriptions, 35 A.L.R. 832.

Pledgee's right to allowance for assessments paid on pledged stock, 40 A.L.R. 268.

Insolvency of corporation as barring stockholder's right to rescind subscription on ground of fraud, 41 A.L.R. 674; 46 A.L.R. 484.

Liability of transferor for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 45 A.L.R. 99; 86 A.L.R. 57.

Liability of transferor for calls or assessments, as affected by failure to enter transfer of stock on corporate books, 45 A.L.R. 137; 104 A.L.R. 638.

Binding effect of subscription to stock in corporation to be formed, 61 A.L.R. 1463.

Who may enforce subscription to stock in corporation to be formed, 61 A.L.R. 1504.

Informality of meeting of directors at which assessment was made as affecting its validity, 64 A.L.R. 714.

Infant's rights and liability on subscription to or purchase of corporate stock, 64 A.L.R. 972.

Liability under trust-fund doctrine of subscribers to stock of corporation the charter of which has been canceled for reasons other than insolvency, 71 A.L.R. 103; 90 A.L.R. 1350.

Necessity and sufficiency of notice of withdrawal of subscription to stock in projected corporation, 71 A.L.R. 1345.

Necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock, or other securities, 73 A.L.R. 1120.

Construction, application, and effect of statutes giving corporation a lien on shares of its stockholders for debts due from stockholders to corporation, 80 A.L.R. 1338.

Validity and effect of extrinsic agreement absolving one, in whole or in part, from liability on subscription to corporate stock, 81 A.L.R. 198.

Priority as between lien of corporation and rights of pledgee or bona fide purchaser of corporate stock, 81 A.L.R. 989.

Exclusiveness of statutory remedy of sale or forfeiture of stock to enforce liability for assessment, 83 A.L.R. 898.

Validity of release, cancelation, or compromise of unpaid subscription for stock by corporation or its representatives, 101 A.L.R. 231.

Constitutionality, construction, and application of statutes which forbid or otherwise regulate compensation for organizing corporation, procuring subscription for stock, or selling its securities, 115 A.L.R. 1362.

Situs of corporate stock (or stock in joint stock company) for purpose of attachment, garnishment, or execution, 122 A.L.R. 338.

Implied obligation of purchaser of corporate stock to indemnify a vendor against future calls and assessments, 141 A.L.R. 1351.

Constitutional or statutory provisions prohibiting municipalities or other subdivisions of the state from subscribing to, or acquiring stock of, private corporation, 152 A.L.R. 495.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations, 11 A.L.R.2d 1380.

18 C.J.S. Corporations §§ 282 to 387.

## **§ 53-11-18. Issuance of shares.**

A. Subject to any restrictions in the articles of incorporation, shares may be issued for such consideration as shall be authorized by the board of directors establishing a price (in money or other consideration) or a minimum price or general formula or method by which the price will be determined.

B. Upon authorization by the board of directors, the corporation may issue its own shares in exchange for or in conversion of its outstanding shares, or distribute its own shares, pro rata to its shareholders or the shareholders of one or more classes or series, to effectuate stock dividends or splits, and any such transaction shall not require consideration; provided, that no such issuance of shares of any class or series shall be made to the holders of shares of any other class or series unless it is either expressly provided for in the articles of incorporation, or is authorized by an affirmative vote or the written consent of the holders of at least a majority of the outstanding shares of the class or series in which the distribution is to be made.

History: 1953 Comp., § 51-24-17, enacted by Laws 1967, ch. 81, § 17; 1975, ch. 64, § 7; 1983, ch. 304, § 29.

The 1983 amendment rewrote this section to the extent that a detailed comparison would be impracticable.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 18 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 494. Corporate stock without par value, 19 A.L.R. 131; 36 A.L.R. 791; 45 A.L.R. 1501; 65 A.L.R. 1347.

18 C.J.S. Corporations § 236.

### **§ 53-11-19. Payment for shares.**

The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation, whether performed before or after incorporation. When payment of the consideration for which shares are to be issued has been received by the corporation, the shares shall be deemed to be fully paid. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of a corporation. In the absence of fraud in the transaction, the judgment of the board of

directors or the shareholders, as the case may be, as to the value of the consideration received for shares is conclusive.

History: 1953 Comp., § 51-24-18, enacted by Laws 1967, ch. 81, § 18; 1975, ch. 64, § 8; 1983, ch. 304, § 30.

The 1983 amendment deleted "and nonassessable" at the end of the second sentence.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 19 of the ABA Model Business Corporation Act.

Stock sales to employees subject to Blue Sky Law. - Sales of corporate stock, either for cash or on credit, to employees of the issuing corporation, are subject to the registration provisions of the Blue Sky Law (see 58-13-1 to 58-13-46 NMSA 1978). 1959-60 Op. Att'y Gen. No. 59-49 (rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 20; 18A Am. Jur. 2d Corporations §§ 494 to 508.

Bona fide holder of negotiable paper given in payment of a subscription to corporate stock in violation of law, 4 A.L.R. 1330.

Payment of stock subscriptions in good will, 24 A.L.R. 1285.

Pledge of unissued stock to secure payment of debt as within prohibition against issuing stock or bonds except for money paid, labor done, or property actually received, 51 A.L.R. 1134.

Right of corporation itself, in absence of fraud against it, to complain that stock issued as fully paid was based on overvaluation of property, or receipt of less than par value, 56 A.L.R. 396.

Note as consideration for issuance of corporate stock under statute forbidding issuance of stock except for money paid, property received, etc., 58 A.L.R. 708.

Right of corporation to deny validity of stock issued by it in violation of statutory or constitutional provisions respecting receipt of consideration, as against subsequent bona fide purchasers or pledgees for value, 73 A.L.R. 1435.

Statutory requirement respecting payment for stock as applicable to foreign corporations, 8 A.L.R.2d 1185.

Validity of stock option plan under which selected personnel of corporation may acquire stock interest therein, 34 A.L.R.2d 852.

Patent rights, copyrights, trademarks, secret processes, formulas, or the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received, 37 A.L.R.2d 913.

Construction and effect of constitutional or statutory provisions precluding issuance of corporate stock in consideration of promissory notes, 78 A.L.R.2d 834.

18 C.J.S. Corporations §§ 236 to 247.

## **§ 53-11-20. Stock rights and options.**

Subject to any provisions in respect thereof set forth in its articles of incorporation, a corporation may create and issue, whether or not in connection with the issuance and sale of any of its shares or other securities, rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes. Such rights or options shall be evidenced in the manner approved by the board of directors and, subject to the provisions of the articles of incorporation, shall set forth the terms upon which, the time or times within which and the price or prices at which the shares may be purchased from the corporation upon the exercise of any such right or option. Unless otherwise provided in the articles of incorporation, if the rights or options have been or are to be issued to directors, officers or employees as such of the corporation or of any subsidiary thereof, and not to the shareholders generally, their issuance shall be approved or ratified by the affirmative vote of the holders of a majority of the shares entitled to vote thereon or shall be authorized by and consistent with a plan approved or ratified by such a vote of shareholders. In the absence of fraud in the transaction, the judgment of the board of directors as to the adequacy of the consideration received for the rights or options is conclusive.

History: 1953 Comp., § 51-24-19, enacted by Laws 1967, ch. 81, § 19; 1975, ch. 64, § 9; 1983, ch. 304, § 31.

The 1983 amendment inserted "Unless otherwise provided in the articles of incorporation," at the beginning of the third sentence, inserted "have been or" near the beginning of the third sentence, inserted "or ratified" near the middle of the third sentence, and deleted the former last sentence, which read "The price or prices to be received for any shares having a par value, other than treasury shares to be issued upon the exercise of such rights or options, shall not be less than the par value thereof."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 20 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1957 to 1983.

18 C.J.S. Corporations § 405.

## **§ 53-11-21. Repealed.**

Repeals. - Laws 1983, ch. 304, § 73, repeals 53-11-21 NMSA 1978, relating to determination of the amount of stated capital.

Laws 1983, ch. 304 contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-11-22. Expenses of organization, reorganization and financing.**

The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by the corporation, either out of the consideration received by it in payment for its shares, or by issuance of its shares, without thereby rendering the shares not fully paid.

History: 1953 Comp., § 51-24-21, enacted by Laws 1967, ch. 81, § 21; 1983, ch. 304, § 32.

The 1983 amendment deleted "or assessable" at the end of the section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 22 of the ABA Model Business Corporation Act.

### **§ 53-11-23. Shares represented by certificates and uncertificated shares.**

A. The shares of a corporation shall be represented by certificates or shall be uncertificated shares. Certificates shall be signed by the chairman or vice chairman of the board of directors or the president or a vice president and by the treasurer or an assistant treasurer, the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. Any or all of the signatures upon a certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon the certificate ceases to be an officer, transfer agent or registrar before the certificate is issued, it may be issued by the corporation with the same effect as if he were an officer, transfer agent or registrar at the date of its issue.

B. Every certificate representing shares issued by a corporation which is authorized to issue shares of more than one class shall set forth upon the face or back of the certificate, or shall state that the corporation will furnish to any shareholder upon request and without charge, a full statement of the designations, preferences, limitations

and relative rights of the shares of each class authorized to be issued, and if the corporation is authorized to issue any preferred or special class in series, the variations in the relative rights and preferences between the shares of each series so far as the same have been fixed and determined and the authority of the board of directors to fix and determine the relative rights and preferences of subsequent series.

C. Each certificate representing shares shall state upon its face:

(1) that the corporation is organized under the laws of this state;

(2) the name of the person to whom issued; and

(3) the number and class of shares, and the designation of the series, if any, which the certificate represents.

D. No certificate shall be issued for any share until the consideration established for its issuance is fully paid.

E. Unless otherwise provided by the articles of incorporation or bylaws, the board of directors of a corporation may provide by resolution that some or all of any or all classes and series of its shares shall be uncertificated shares, provided that such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation. Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the registered owner thereof a written notice containing the information required to be set forth or stated on certificates pursuant to Paragraphs (2) and (3) of Subsection C of this section. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated shares and the rights and obligations of the holders of certificates representing shares of the same class and series shall be identical.

History: 1953 Comp., § 51-24-22, enacted by Laws 1967, ch. 81, § 22; 1975, ch. 64, § 10; 1983, ch. 304, § 33.

The 1983 amendment substituted the present catchline for "Certificates representing shares"; rewrote the former first two sentences of Subsection A as the present first three sentences, adding provisions for uncertificated shares and for signing by the treasurer or assistant treasurer and deleting language which provided for facsimile signatures if the certificate is manually signed on behalf of a transfer agent or a registrar other than the corporation or its employee; inserted "transfer agent or registrar" in three places in the last sentence of Subsection A; substituted "the same" for "they" near the end of Subsection B; deleted former Paragraph (4) of Subsection C, which read "the par value of each share represented by the certificate, or a statement that the shares are without par value"; substituted "the consideration established for its issuance" for "such share" in Subsection D; and added Subsection E; and made other minor changes.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 23 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 487, 488, 490.

Corporate stock or certificate thereof as subject of conversion, 21 A.L.R. 390; 83 A.L.R. 1199.

Certificate of stock as conclusive and exclusive evidence of stockholder's rights, 31 A.L.R. 1326.

Corporation's delivery of stock certificate to stockholder as prerequisite of its issuance to him, 16 A.L.R.3d 1015.

Measure of damages for conversion of corporate stock or certificate, 31 A.L.R.3d 1286. 18 C.J.S. Corporations §§ 258 to 267.

## **§ 53-11-24. Fractional shares.**

A. A corporation may:

(1) issue fractions of a share, either represented by a certificate or uncertificated;

(2) arrange for the disposition of fractional interests by those entitled thereto;

(3) pay in money the fair value of fractions of a share as of the time when those entitled to receive such fractions are determined; or

(4) issue scrip in registered or bearer form which shall entitle the holder to receive a certificate for a full share or an uncertificated full share upon the surrender of such scrip aggregating a full share.

B. A certificate for a fractional share or an uncertificated fractional share shall, but scrip shall not unless otherwise provided therein, entitle the holder to exercise voting rights, to receive dividends thereon and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause scrip to be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares or uncertificated full shares before a specified date, or subject to the condition that the shares for which the scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of the scrip, or subject to any other conditions which the board of directors may deem advisable.

History: 1953 Comp., § 51-24-23, enacted by Laws 1967, ch. 81, § 23; 1975, ch. 64, § 11; 1983, ch. 304, § 34.

The 1983 amendment inserted "either represented by a certificate or uncertificated" in Paragraph (1) of Subsection A, substituted "money" for "cash" in Paragraph (3) of Subsection A, inserted "or an uncertificated full share" in Paragraph (4) of Subsection A, and inserted "or an uncertificated fractional share" in the first and second sentences of Subsection B.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 24 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 1022.

## **§ 53-11-25. Liability of subscribers and shareholders.**

A. A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to the shares other than the obligation to pay to the corporation the full consideration for which the shares were issued or to be issued.

B. No person who becomes an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall be personally liable to the corporation or its creditors for any unpaid portion of the consideration. No executor, administrator, conservator, guardian, custodian, trustee, assignee for the benefit of creditors or receiver shall be personally liable to the corporation as a holder of, or subscriber to, shares of a corporation but the estate and funds in his hands shall be so liable. No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

History: 1953 Comp., § 51-24-24, enacted by Laws 1967, ch. 81, § 24.

Compiler's notes. - This section is derived from Section 25 of the ABA Model Business Corporation Act.

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 42, 45; 18A Am. Jur. 2d Corporations §§ 186 to 188, 249 to 257, 850, 852, 865 to 877.

Liability of one whose name appears upon corporate books as a stockholder without his consent, 3 A.L.R. 1049.

Liability upon stock subscription payable in services which are rendered unnecessary by the insolvency of corporation, or other cause, 6 A.L.R. 277.

Right of subscriber to defeat liability on ground of failure to comply with statutory requirement of payment at time of subscribing, 6 A.L.R. 1116.

Right of creditor of insolvent corporation to sue stockholder at law upon unpaid subscription, 7 A.L.R. 100.

Creditor's knowledge that stock is unpaid as affecting stockholder's liability, 7 A.L.R. 972; 69 A.L.R. 881.

Unauthorized change in name, personal liability of officers or stockholders for debts of corporation making, 8 A.L.R. 583.

Liability of transferees on unpaid subscription to stock issued in exchange for property or services at an overvaluation, 12 A.L.R. 449.

Forfeiture of stock for nonpayment of assessments as affecting liability to creditors of stockholder, 19 A.L.R. 1096.

Enforcement during liquidation or receivership, of unpaid stock subscriptions, to equalize loss among stockholders, 35 A.L.R. 493.

Reorganization, consolidation, or merger of corporation as affecting liability on stock subscription, 45 A.L.R. 1031; 89 A.L.R. 770; 154 A.L.R. 427.

Liability of stockholder as affected by business of corporation being turned over to an officer of the court or other persons, 55 A.L.R. 327.

Right of stockholders contributing to make good losses to be reimbursed by, or out of assets of, corporation, 55 A.L.R. 794.

Effect of stockholder's bankruptcy upon his liability as stockholder, 62 A.L.R. 988.

Liability under trust fund doctrine, of subscribers to stock of corporation the charter of which has been canceled for reasons other than insolvency, 71 A.L.R. 103; 90 A.L.R. 1350.

Right of person who has paid corporation's indebtedness to be subrogated to creditors' right to enforce stockholders' statutory liability, 78 A.L.R. 611.

Death of stockholder as affecting statutory added liability, 79 A.L.R. 1537; 96 A.L.R. 1466.

Validity and effect of agreement absolving one, in whole or in part, from liability on subscription to corporate stock, 81 A.L.R. 198.

Liability as shareholder of pledgee of stock, 82 A.L.R. 565.

Assignment or sale of stockholders' statutory liability, 82 A.L.R. 1285; 159 A.L.R. 1114.

Added liability of holders of corporate stock the issue of which was ultra vires, invalid, or irregular, 86 A.L.R. 816.

Fraudulent conveyance or transfer by stockholder as regards his liability as stockholder to creditors of corporation, 89 A.L.R. 751.

Liability on stock standing in name of one as trustee or in other fiduciary capacity, 91

A.L.R. 257; 97 A.L.R. 1250; 117 A.L.R. 655.

Change in or renewal of corporation's obligation as affecting liability of stockholder of bank or other corporation, 97 A.L.R. 630.

Setoff of liability of stockholder of insolvent corporation against corporation's debt to him, 98 A.L.R. 647.

Life interest and remainder in corporate stock as affecting stockholder's statutory liability, 99 A.L.R. 505.

Liability of officers, directors or members of defectively organized corporation to one of their number for advancements or commissions, 115 A.L.R. 658.

Promise by stockholder to pay debt of corporation, 35 A.L.R.2d 906.

Stockholder's liability after reduction of capital stock, 35 A.L.R.2d 1185.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 A.L.R.3d 500.

18 C.J.S. Corporations §§ 580 to 714.

### **§ 53-11-26. Shareholders' preemptive rights.**

Except to the extent limited or denied by this section or by the articles of incorporation, shareholders shall have a preemptive right to acquire authorized but unissued shares, or securities convertible into such shares or carrying a right to subscribe to or acquire shares. Unless otherwise provided in the articles of incorporation:

A. holders of shares of any class that is preferred or limited as to dividends or assets shall not be entitled to any preemptive right;

B. holders of shares of common stock shall not be entitled to any preemptive right to shares of any class that is preferred or limited as to dividends or assets or to any obligations, unless convertible into shares of common stock or carrying a right to subscribe to or acquire shares of common stock;

C. holders of common stock without voting power shall have no preemptive right to shares of common stock with voting power; and

D. the preemptive right shall be only an opportunity to acquire shares or other securities under such terms and conditions as the board of directors may fix for the purpose of providing a fair and reasonable opportunity for the exercise of such right.

History: 1953 Comp., § 51-24-25, enacted by Laws 1975, ch. 64, § 12; 1983, ch. 304, § 35.

The 1983 amendment substituted "authorized but unissued" for "unissued or treasury" preceding "shares" in the first sentence of the introductory language.

Repeals and reenactments. - Laws 1975, ch. 64, § 12, repealed former 51-24-25, 1953 Comp., relating to the preemptive rights of shareholders and employees, and enacted a new 51-24-25, 1953 Comp.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived in part from Section 26 of ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 525 to 539.  
18 C.J.S. Corporations § 201.

## **§ 53-11-27. Bylaws.**

The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless reserved to the shareholders by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

History: 1953 Comp., § 51-24-26, enacted by Laws 1967, ch. 81, § 26.

Compiler's notes. - This section is derived from Section 27 of the ABA Model Business Corporation Act.

Modification of bylaws. - The action of the board of directors in entering into employment contract modified in its legal effect all inconsistent bylaws and prevails over them. *Jennings v. Ruidoso Racing Ass'n*, 79 N.M. 144, 441 P.2d 42 (1968).

Unless contrary bylaw adopted by shareholders. - Even if the bylaws could be interpreted to prohibit employment of a comptroller prior to the annual election of directors, absent a contrary bylaw adopted by the stockholders, the directors have power to make or amend the bylaws and a silent record as to any such stockholders' action amounts to failure of the corporation to maintain their burden of showing a lack of authority in the directors to enact or amend the bylaw. *Jennings v. Ruidoso Racing Ass'n*, 79 N.M. 144, 441 P.2d 42 (1968).

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporations Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 17, 18; 18A Am. Jur. 2d Corporations §§ 310 to 332.

President's power to employ, control, or discharge agents or subordinates, as affected by bylaws, 5 A.L.R. 1492.

Stockholder's right to inspect books and records of corporation as affected by bylaws, 22 A.L.R. 32; 43 A.L.R. 783; 59 A.L.R. 1373; 80 A.L.R. 1502; 174 A.L.R. 262; 15 A.L.R.2d 11.

Enforceability of invalid corporate bylaw as contract, 59 A.L.R. 290.

Power to remove officers or directors as affected by bylaws, 63 A.L.R. 779.

Validity of bylaw restricting transfer of stock, 65 A.L.R. 1159; 61 A.L.R.2d 1318.

Validity and construction of corporate articles or bylaws relating to stock held by one retiring from corporate office or employment, 66 A.L.R. 1295.

Provision of articles, bylaws, or agreement regarding future determination by parties other than owner of price at which corporate stock is to be taken over by corporation or stockholders upon specified event, 117 A.L.R. 1359.

Removal of officer, agent, or employee at any time, bylaw authorizing, as affecting contract of employment for specified period, 145 A.L.R. 312.

Enforceability of invalid corporate bylaw as contract, 159 A.L.R. 290.

Provision of statute, charter, or bylaws respecting amendment of corporate bylaws as excluding waiver thereof, 169 A.L.R. 1374.

Construction and application of provisions of bylaws providing for restricting sale or transfer of stock, 2 A.L.R.2d 754.

President's power to have litigation instituted where board of directors has failed or refused to grant permission, as affected by bylaws, 10 A.L.R.2d 713.

Conflict of laws as to validity and effect of corporate bylaws, 27 A.L.R.2d 435.

Construction and effect of corporate articles, charter, or bylaws limiting duration or maturity of indebtedness, 55 A.L.R.2d 949.

Construction and effect of corporate bylaws or articles relating to change in number of directors, 3 A.L.R.3d 623.

18 C.J.S. Corporations §§ 179 to 191.

## **§ 53-11-28. Meetings of shareholders.**

A. Meetings of shareholders may be held at any place within or without this state in accordance with the bylaws. If no other place is designated in, or fixed in accordance with, the bylaws, meetings shall be held at the registered office of the corporation.

B. An annual meeting of the shareholders shall be held at the time designated in or fixed in accordance with the bylaws. If the annual meeting is not held within any thirteen-month period, the district court may, on the application of any shareholder, order a meeting to be held.

C. Special meetings of the shareholders may be called by the board of directors, the holders of not less than one-tenth of all the shares entitled to vote at the meeting, or such other persons as may be authorized in the articles of incorporation or the bylaws.

History: 1953 Comp., § 51-24-27, enacted by Laws 1967, ch. 81, § 27; 1975, ch. 64, § 13.

Compiler's notes. - This section is derived from Section 28 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 948 to 962; 18B Am. Jur. 2d Corporations §§ 1365 to 1367, 1436.

Time for regular meeting of stockholders, power of directors to change, 2 A.L.R. 558; 8 A.L.R. 678.

Informality of meeting of stockholders as affecting action taken thereat, 51 A.L.R. 941.

Admissibility of oral evidence as to proceedings at meetings of stockholders or directors, 66 A.L.R. 1328; 48 A.L.R.2d 1259.

Remedies to restrain or compel holding of stockholders' meetings, 48 A.L.R.2d 615. 18 C.J.S. Corporations §§ 539 to 543.

### **§ 53-11-29. Notice of shareholders' meetings.**

Written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, at the direction of the president, the secretary or the officer or persons calling the meeting, to each shareholder of record entitled to vote at the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the stock transfer books of the corporation, with postage thereon prepaid. Attendance of a shareholder in person or by proxy at a meeting constitutes a waiver of notice of the meeting, except where a shareholder attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

History: 1953 Comp., § 51-24-28, enacted by Laws 1967, ch. 81, § 28.

Compiler's notes. - This section is derived from Section 29 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 963 to 985; 18B Am. Jur. 2d Corporations §§ 1368 to 1370, 1436.

18 C.J.S. Corporations § 544.

### **§ 53-11-30. Closing of transfer books and fixing record date.**

For the purpose of determining shareholders entitled to notice of, or to vote at, any meeting of shareholders or any adjournment thereof, or entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors of a corporation may provide that the stock transfer books shall be closed for a stated period not to exceed fifty days. If the stock transfer books are closed for the purpose of determining shareholders entitled to notice of, or to vote at, a meeting of shareholders, the books shall be closed for at least ten days immediately preceding the meeting. In lieu of closing the stock transfer books, the bylaws, or in the absence of an applicable bylaw, the board of directors may fix in advance a date as the record date for any such determination of shareholders, the date to be not more than fifty days and, in case of a meeting of shareholders, not less than ten days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of, or to vote at, a meeting of shareholders, or shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring the dividend is adopted, as the case may be, shall be the record date for the determination of shareholders. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, the determination shall apply to any adjournment thereof.

History: 1953 Comp., § 51-24-29, enacted by Laws 1967, ch. 81, § 29.

Compiler's notes. - This section is derived from Section 30 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Transfer on corporate books as sufficient for gift of stock, 6 A.L.R.4th 250.

### **§ 53-11-31. Voting list.**

The officer or agent having charge of the stock transfer books for shares of a corporation shall make, at least ten days before each meeting of shareholders, a complete list of the shareholders entitled to vote at the meeting or any adjournment thereof, arranged in alphabetical order, with the address of, and the number of shares held by, each, which list, for a period of ten days prior to the meeting, shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. The list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original stock transfer books shall be prima facie evidence as to who are the shareholders entitled to examine the list or transfer books or to vote at any meeting of shareholders. Failure to comply with the requirements of this section does not affect the validity of any action taken at the meeting. An officer or agent having charge of the stock transfer books who

fails to prepare the list of shareholders, or keep it on file for a period of ten days, or produce and keep it open for inspection at the meeting, as provided in this section is liable to any shareholder suffering damage on account of the failure, to the extent of the damage.

History: 1953 Comp., § 51-24-30, enacted by Laws 1967, ch. 81, § 30.

Compiler's notes. - This section is derived from Section 31 of the ABA Model Business Corporation Act.

Omission of names of eligible voters. - In a shareholder election for a corporation's board of directors, the votes reflecting Class B shares of stock should have been counted in the candidates' totals, even though the voting list, prepared before the election, did not list the Class B shares and their owners. The Class B shareholders, who were entitled to vote by law, should not have been disenfranchised by another's misfeasance or malfeasance. In addition, this section, which specifies voting list requirements, provides in part: "Failure to comply with the requirements of this section does not affect the validity of any action taken at the [shareholders'] meeting". *Pena v. Westland Dev. Co.*, 107 N.M. 560, 761 P.2d 438 (Ct. App. 1988).

### **§ 53-11-32. Quorum of shareholders.**

Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting. A quorum, once attained at a meeting, shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough shares to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] or the articles of incorporation.

History: 1953 Comp., § 51-24-31, enacted by Laws 1967, ch. 81, § 31.

Compiler's notes. - This section is derived from Section 32 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 993 to 998; 18B Am. Jur. 2d Corporations § 1372.

Stockholders required for quorum or vote as determined by number of shares, 63 A.L.R.

1106.

18 C.J.S. Corporations § 546.

### **§ 53-11-33. Voting of shares.**

A. Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except as otherwise provided in the articles of incorporation. If the articles of incorporation provide for more or less than one vote for any share, on any matter, every reference in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] to a majority or other proportion of shares shall refer to such a majority or other proportion of votes entitled to be cast. The articles of incorporation may grant, either absolutely or conditionally to the holders of bonds, debentures or other obligations of the corporation the power to vote on specified matters, including the election of directors, and this right shall not be terminated except upon written assent of the holders of a majority in aggregate face amount of the bonds or debentures.

B. Shares held by another corporation, domestic or foreign, if a majority of the shares entitled to vote for the election of directors of the other corporation is held by the corporation, shall not be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

C. The articles of incorporation may provide that at each election for directors every shareholder entitled to vote at the election has the right to vote, in person or by proxy, the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of the candidates. A statement in the articles of incorporation that cumulative voting exists is sufficient to confer such right.

D. Shares standing in the name of another corporation, domestic or foreign, may be voted by the officer, agent or proxy as the bylaws of the other corporation may prescribe, or, in the absence of such provisions, as the board of directors of the other corporation may determine.

E. Shares held by an administrator, executor, guardian or conservator may be voted by him, either in person or by proxy, without a transfer of the shares into his name. Shares standing in the name of a trustee, or a custodian for a minor, may be voted by him, either in person or by proxy, but only after a transfer of the shares into his name.

F. A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney in fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

G. Shares standing in the name of a receiver or bankruptcy trustee may be voted by the receiver or bankruptcy trustee, and shares held by or under the control of a receiver or bankruptcy trustee may be voted by him without the transfer thereof into his name if authority so to do is contained in an appropriate order of the court by which the receiver or bankruptcy trustee was appointed.

H. A shareholder whose shares are pledged may vote the shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee may vote the shares so transferred.

I. Shares standing in the name of a partnership may be voted by any partner, and shares standing in the name of a limited partnership may be voted by any general partner.

J. Shares standing in the name of a person as life tenant may be voted by him, either in person or by proxy.

K. From the date on which written notice of redemption of redeemable shares has been mailed to the holders thereof and a sum sufficient to redeem the shares has been deposited with a bank or trust company with irrevocable instruction and authority to pay the redemption price to the holders thereof upon surrender of certificates therefor, the shares shall not be entitled to vote on any matter and shall not be deemed to be outstanding shares.

History: 1953 Comp., § 51-24-32, enacted by Laws 1967, ch. 81, § 32; 1975, ch. 64, § 14; 1983, ch. 304, § 36.

The 1983 amendment deleted "Neither treasury shares, nor" at the beginning of Subsection B, inserted "not" near the end of Subsection B, and substituted "provisions" for "provision" in Subsection D.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 33 of the ABA Model Business Corporation Act.

Voting list omitting names of eligible voters. - In a shareholder election for a corporation's board of directors, the votes reflecting Class B shares of stock should have been counted in the candidates' totals, even though the voting list, prepared before the election, did not list the Class B shares and their owners. The Class B shareholders, who were entitled to vote by law, should not have been disenfranchised by another's misfeasance or malfeasance. In addition, § 53-11-31 NMSA 1978, which specifies voting list requirements, provides in part: "Failure to comply with the requirements of this section does not affect the validity of any action taken at the

[shareholders'] meeting". *Pena v. Westland Dev. Co.*, 107 N.M. 560, 761 P.2d 438 (Ct. App. 1988).

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M. L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 24; 18A Am. Jur. 2d Corporations §§ 1015 to 1102; 18B Am. Jur. 2d Corporations §§ 1384 to 1394. Validity and effect of provisions in will to control voting power of corporate stock, 9 A.L.R. 1242; 17 A.L.R. 238.

Reconsideration of vote in stockholder's or director's meeting, 13 A.L.R. 131.

Right to issue stock without voting power, 21 A.L.R. 643.

Waiver of right to object to voting of invalid or unauthorized stock, 72 A.L.R. 948.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 A.L.R. 315.

Construction and application of provisions of statute, charter, bylaws, or stock certificate conferring upon holders of preferred or other specified class of stock a right to vote in event of nonpayment of dividends or other specified conditions, 154 A.L.R. 418.

Revocability of proxy to vote stock, 159 A.L.R. 307.

Cumulative voting of stock for corporate directors, 43 A.L.R.2d 1322.

Agreement controlling the vote of corporate stock, 45 A.L.R.2d 799.

Expenses incurred by competing factions within corporation in soliciting proxies as charge against corporation, 51 A.L.R.2d 873.

Proxies provision of Federal Securities Exchange Act, § 14 (U.S.C., Tit. 15, § 78n), 55 A.L.R.2d 1126.

Voting of jointly held or fractional share in corporation, 98 A.L.R.2d 357.

Validity of proxy agreement for control of voting power of corporate stock, 98 A.L.R.2d 376.

Who may exercise voting power of corporate stock pending settlement of estate of deceased owner, 7 A.L.R.3d 629.

Casting ballots after closing of polls, 41 A.L.R.3d 234.

Misrepresentation in proxy solicitation - state cases, 20 A.L.R.4th 1287.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 A.L.R.4th 13.

18 C.J.S. Corporations §§ 547 to 550.

## **§ 53-11-34. Voting trusts and agreements among shareholders.**

A. Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to the trustee or trustees for the purposes of the agreement.

The trustee or trustees shall keep a record of the holders of voting trust certificates evidencing a beneficial interest in the voting trust, giving the names and addresses of all such holders and the number and class of the shares in respect of which the voting trust certificates held by each are issued, and shall deposit a copy of such record with the corporation at its registered office. Failure to keep or deposit the record as required by this subsection does not affect the validity of the agreement or any action taken pursuant to it. Any trustee or trustees who fail to keep or deposit the record as required is liable to any holder of a voting trust certificate suffering damage on account of the failure to the extent of the damage. The counterpart of the voting trust agreement deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of record of voting trust certificates, either in person or by agent or attorney, at any reasonable time for any proper purpose.

B. Agreements among shareholders regarding the voting of their shares, which agreements are not voting trusts or purported voting trusts, shall not be subject to the provisions of Subsection A of this section and shall be valid and specifically enforceable.

History: 1953 Comp., § 51-24-33, enacted by Laws 1967, ch. 81, § 33; 1975, ch. 64, § 15.

Compiler's notes. - This section is derived from Section 34 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 24; 18A Am. Jur. 2d Corporations §§ 1112 to 1158, 1387.

Powers of voting trustees, 159 A.L.R. 1067.

Transfer of beneficiary's interest, validity of provision of voting trust against, 11 A.L.R.2d 1000.

Removal of trustee of voting trust, 34 A.L.R.2d 1136.

Agreement controlling the vote of corporate stock, 45 A.L.R.2d 799.

Validity of voting trusts or other similar agreement for control of voting power of corporate stock, 98 A.L.R.2d 376.

18 C.J.S. Corporations §§ 551, 552.

## **§ 53-11-35. Board of directors.**

A. All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in the Business Corporation Act [53-11-1 to 53-

18-12 NMSA 1978] or the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by the Business Corporation Act shall be exercised or performed to such extent and by such person or persons as provided in the articles of incorporation. Directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors. The board of directors may fix the compensation of directors unless otherwise provided in the articles of incorporation.

B. A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director believes to be in or not opposed to the best interests of the corporation, and with such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties, a director shall be entitled to rely on factual information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) counsel, public accountants or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence; or

(3) a committee of the board upon which the director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs such duties shall have no liability by reason of being or having been a director of the corporation.

C. A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director's dissent shall be entered in the minutes of the meeting or unless the director shall file written dissent to such action with the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

D. For purposes of Subsection B of this section, a director, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

(1) the interests of the corporation's employees, suppliers, creditors and customers;

(2) the economy of the state and nation;

(3) the impact of any action upon the communities in or near which the corporation's facilities or operations are located; and

(4) the long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation.

History: 1953 Comp., § 51-24-34, enacted by Laws 1967, ch. 81, § 34; 1975, ch. 64, § 16; 1983, ch. 304, § 37; 1987, ch. 238, § 10.

The 1983 amendment designated the existing provisions as Subsection A, added "All corporate powers shall be exercised by or under authority of, and" at the beginning of the first sentence of Subsection A, substituted "under the direction of" for "by," and inserted "the Business Corporation Act or" in the first sentence of Subsection A, and added Subsections B and C.

The 1987 amendment, effective April 9, 1987, inserted "or not opposed to" in Subsection B, made minor stylistic changes in that subsection, and added Subsection D.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 35 of the ABA Model Business Corporation Act.

Law reviews. - For article, "The New Mexico Professional Corporation," see 9 Nat. Resources J. 591 (1969).

For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1341 to 1364, 1381, 1395, 1396, 1399, 1483, 1484, 1486.

Duty of director to disclose lien or claim against property on which corporation or association lends money, 3 A.L.R. 1058.

Power of directors to sell, without consent of stockholders, property of corporation, 5 A.L.R. 930; 60 A.L.R. 1210.

Maintenance of designated person in office, contract of director or stockholder for, 12

A.L.R. 1070; 45 A.L.R. 795.

Court's right to interfere with amount of salaries voted to officers of private corporations by directors, 27 A.L.R. 300; 44 A.L.R. 570.

Character or ability as a qualification of membership of board of trustees or directors, 30 A.L.R. 248.

Fixing wages or salaries of working stockholders above those current for similar services, 48 A.L.R. 508.

Right of stockholder, director, officer, or agent to engage in similar or competing business, 64 A.L.R. 782.

Responsibility of corporation for misstatements by officer or employee to induce or influence purchase of stock, 66 A.L.R. 1450.

Power of other officers to fix compensation of officers, 72 A.L.R. 238.

Purchase by officer or director in his own interest at a judicial or other public sale of the corporate property, 76 A.L.R. 439.

Implied or ostensible authority of officer or employee of private corporation to take or negotiate leaseholds for corporation or its subsidiaries, 107 A.L.R. 996.

Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election, but who afterwards became such, 130 A.L.R. 156.

Authority of directors to employ attorney for corporation, 130 A.L.R. 897.

Right of stockholder as individual to complain as against officers, directors, or large stockholders, of their transactions in corporation's outstanding stock involving its control or other purpose, 132 A.L.R. 260.

Validity, construction, and effect of statute or corporate regulation requiring deposit of stock of corporation as condition of qualification of director, 148 A.L.R. 1164.

Attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation as charge against the corporation, 152 A.L.R. 909; 39 A.L.R.2d 580.

Purchase of claims against corporation by officer or director, 13 A.L.R.2d 1172.

Validity of contract between corporations as affected by directors or officers in common, 33 A.L.R.2d 1060.

Authority of corporate officers to mortgage or pledge corporate personal property, 62 A.L.R.2d 712.

Validity of stockholders' agreement allegedly infringing in directors' management powers - modern cases, 15 A.L.R.4th 1078.

Financial inability of corporation to take advantage of business opportunity as affecting determination whether "corporate opportunity" was presented, 16 A.L.R.4th 185.

Purchase of shares of corporation by director or officer as usurpation of "corporate opportunity," 16 A.L.R.4th 784.

Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director, 17 A.L.R.4th 479.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

19 C.J.S. Corporations §§ 726, 742, 803 to 806.

## **§ 53-11-36. Number and election of directors.**

The number of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the bylaws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director. If the number of directors is not fixed by, or in the manner provided in, the bylaws or the articles of incorporation, the number shall be the same as the number of directors constituting the initial board of directors. The names and addresses of the members of the first board of directors shall be stated in the articles of incorporation. Such persons shall hold office until the first annual meeting of shareholders, and until their successors have been elected and qualified. At the first annual meeting of shareholders and at each annual meeting thereafter the shareholders shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors as permitted by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. Each director shall hold office for the term for which he is elected and until his successor has been elected and qualified.

History: 1953 Comp., § 51-24-35, enacted by Laws 1967, ch. 81, § 35; 1975, ch. 64, § 17.

Compiler's notes. - This section is derived from Section 36 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1349 to 1352, 1360, 1362, 1363, 1381, 1395 to 1399.

Construction and effect of corporate bylaws or articles relating to change in number of directors, 3 A.L.R.3d 623.

19 C.J.S. Corporations §§ 716, 732.

### **§ 53-11-37. Classification of directors.**

When the board of directors consists of nine or more members, in lieu of electing the whole number of directors annually, the articles of incorporation may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after the classification the number of directors equal to the number of the class whose term

expires at the time of the meeting shall be elected to hold office until the second succeeding annual meeting, if there are two classes, or until the third succeeding annual meeting, if there are three classes. No classification of directors shall be effective prior to the first annual meeting of shareholders.

History: 1953 Comp., § 51-24-36, enacted by Laws 1967, ch. 81, § 36.

Compiler's notes. - This section is derived from Section 37 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1397, 1398.

### **§ 53-11-38. Vacancies.**

Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

History: 1953 Comp., § 51-24-37, enacted by Laws 1967, ch. 81, § 37; 1975, ch. 64, § 18.

Compiler's notes. - This section is derived from Section 38 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1400, 1401.

Provision authorizing directors to fill vacancies in directorships as applicable to newly created directorships, 6 A.L.R.2d 174.

19 C.J.S. Corporations § 716.

### **§ 53-11-39. Removal of directors.**

A. At a meeting of shareholders called expressly for that purpose, directors may be removed in the manner provided in this section. Any director or the entire board of directors may be removed, with or without cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

B. In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no one of the directors may be removed if the votes cast against his removal would be sufficient to elect him if then cumulatively voted at an election of the entire board of directors, or, if there are classes of directors, at an election of the class of directors of which he is a part.

C. Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the articles of incorporation, the provisions of this section apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

History: 1953 Comp., § 51-24-38, enacted by Laws 1967, ch. 81, § 38; 1975, ch. 64, § 19.

Compiler's notes. - This section is derived from Section 39 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1427 to 1444.

Directors' power to remove officers or fellow directors, 63 A.L.R. 776.

Removal by court of director or officer of private corporation, 124 A.L.R. 364.

19 C.J.S. Corporations § 738.

### **§ 53-11-40. Quorum of directors.**

A majority of the number of directors as fixed pursuant to Section 53-11-36 NMSA 1978 shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. A quorum, once attained at a meeting, shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough directors to leave less than a quorum. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

History: 1953 Comp., § 51-24-39, enacted by Laws 1967, ch. 81, § 39; 1975, ch. 64, § 20.

Compiler's notes. - This section is derived from Section 40 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1470 to 1474.

19 C.J.S. Corporations § 749.

### **§ 53-11-40.1. Director conflict of interest.**

A. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved or ratified the transaction;

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction; or

(3) the transaction was fair to the corporation.

B. For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) another entity of which he is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

For purposes of this section, a director of the corporation does not have a direct or indirect interest in a transaction solely because the transaction may involve or effect a change in control of the corporation or his continuation in office as a director of that corporation.

C. For purposes of Paragraph (1) of Subsection A of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the affirmative vote of a majority of the directors on the board [of] directors or on a committee of the board of directors who have no direct or indirect interest in the transaction but a transaction may not be authorized, approved or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of or a vote cast by a director with a direct or indirect interest in the transaction does not affect the validity of any action

taken under Paragraph (1) of Subsection A of this section if the transaction is otherwise authorized, approved or ratified as provided in that subsection.

D. For purposes of Paragraph (2) of Subsection A of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction and shares owned by or voted under the control of an entity described in Paragraph (2) of Subsection B of this section may not be counted in a vote of shareholders to determine whether to authorize, approve or ratify a conflict of interest transaction under Paragraph (2) of Subsection A of this section. The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

History: 1978 Comp., § 53-11-40.1, enacted by Laws 1987, ch. 238, § 11.

Emergency clauses. - Laws 1987, ch. 238, § 15 makes the act effective immediately. Approved April 9, 1987.

### **§ 53-11-41. Executive and other committees.**

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in the resolution or in the articles of incorporation or the bylaws of the corporation, shall have and may exercise all the authority of the board of directors, except that no such committee shall have authority to:

- A. declare dividends or authorize distributions;
- B. approve or recommend to shareholders actions or proposals required by this act to be approved by shareholders;
- C. designate candidates for the office of director, for purposes of proxy solicitation or otherwise, or fill vacancies on the board of directors or any committee thereof;
- D. amend the bylaws;
- E. approve a plan of merger not requiring shareholder approval;
- F. authorize or approve the reacquisition of shares unless pursuant to general formula or method specified by the board of directors; or

G. authorize or approve the issuance or sale of, or any contract to issue or sell, shares or designate the terms of a series of a class of shares, provided that the board of directors, having acted regarding general authorization for the issuance or sale of shares, or any contract therefor, and, in the case of a series, the designation thereof, may, pursuant to a general formula or method specified by the board of resolution or by adoption of a stock option or other plan, authorize a committee to fix the terms of any contract for the sale of the shares and to fix the terms upon which such shares may be issued or sold, including, without limitation, the price, the dividend rate, provisions for redemption, sinking fund, conversion, voting or preferential rights, and provisions for other features of a class of shares, or a series of a class of shares, with full power in such committee to adopt any final resolution setting forth all the terms thereof and to authorize the statement of the terms of a series for filing with the commission under this act. Neither the designation of any such committee, the delegation thereto of authority nor action by such committee pursuant to such authority shall alone constitute compliance by any member of the board of directors, not a member of the committee in question, with the director's responsibility to act in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.

History: 1953 Comp., § 51-24-40, enacted by Laws 1967, ch. 81, § 40; 1983, ch. 304, § 38.

The 1983 amendment, beginning with the language "except that no such committee shall have authority to:" at the end of the introductory language rewrote this section to the extent that a detailed comparison would be impracticable.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 42 of the ABA Model Business Corporation Act.

Meaning of "this act". - The term, "this act," referred to in Subsections B and G, means Laws 1983, ch. 304, which amended various sections in Chapter 53, including this section. For a complete list of sections affected by ch. 304, consult the Tables of Disposition of Laws in Volume 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1507, 1508, 1510 to 1512, 1519, 1520.  
19 C.J.S. Corporations §§ 758, 760.

## **§ 53-11-42. Place and notice of directors' meetings; committee meetings.**

Meetings of the board of directors, regular or special, or any committee designated thereby, may be held either within or without this state. Regular meetings of the board of directors or any committee designated thereby may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors or any committee designated thereby shall be held upon the notice prescribed in the bylaws. Attendance of a director at a meeting constitutes a waiver of notice of the meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors or any committee designated thereby need be specified in the notice or waiver of notice of the meeting unless required by the bylaws. Except as otherwise restricted by the articles of incorporation or bylaws, members of the board of directors or any committee designated thereby may participate in a meeting of the board or committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time and participation by such means shall constitute presence in person at a meeting.

History: 1953 Comp., § 51-24-41, enacted by Laws 1967, ch. 81, § 41; 1975, ch. 64, § 21.

Compiler's notes. - This section is derived from Section 43 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1446 to 1450, 1464 to 1466, 1475.

Informality of meeting of directors as affecting action taken thereat, 64 A.L.R. 712.

Admissibility of oral evidence as to proceedings at meetings of stockholders or directors, 66 A.L.R. 1328; 48 A.L.R.2d 1259.

19 C.J.S. Corporations §§ 746, 747.

### **§ 53-11-43. Action by directors without a meeting.**

Unless otherwise provided by the articles of incorporation or bylaws, any action required by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] to be taken at a meeting of the directors of a corporation, or any action which may be taken at a meeting of the directors or of a committee, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the directors, or all of the members of the committee, as the case may be. The consent shall have the same effect as a unanimous vote.

History: 1953 Comp., § 51-24-42, enacted by Laws 1967, ch. 81, § 42.

Compiler's notes. - This section is derived from Section 44 of the ABA Model Business Corporation Act.

## **§ 53-11-44. Distributions to shareholders.**

A. Subject to any restrictions in the articles of incorporation, the board of directors may authorize and the corporation may make distributions, except that no distribution may be made if, after giving effect thereto, either:

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

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

B. Determinations under Paragraph (2) of Subsection A of this section may be based upon:

(1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) a fair valuation or other method that is reasonable in the circumstances.

C. In the case of a purchase, redemption or other acquisition of a corporation's shares, the effect of a distribution shall be measured as of the date money or other property is transferred or debt is incurred by the corporation, or as of the date the shareholder ceases to be a shareholder of the corporation with respect to such shares, whichever is earlier. In all other cases, the effect of a distribution shall be measured as of the date of its authorization, or as of the date of payment if payment occurs more than one hundred twenty days following the date of authorization.

D. Indebtedness of a corporation incurred or issued to a shareholder in a distribution in accordance with this section shall be on a parity with the indebtedness of the corporation to its general unsecured creditors except to the extent subordinated by agreement.

E. In circumstances to which this section and related sections of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] are applicable, such provisions supersede the applicability of any other statutes of this state with respect to the legality of distributions.

History: 1978 Comp., § 53-11-44, enacted by Laws 1983, ch. 304, § 39.

Repeals and reenactments. - Laws 1983, ch. 304, § 39, repeals former 53-11-44 NMSA 1978, relating to dividends, and enacts the above section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Change in accounting method. - Where accounting procedures uniformly followed by corporation were those in effect at the time of the purchase and sale of stock for several years prior thereto, and where such accounting methods were acceptable to the taxing authorities, and where there was no suggestion that there was any fraud or absence of good faith on the part of the corporation in their accounting practice followed, a different method of accounting from that in use over the years should not have been applied in determining the availability of surplus, for to do so would be to open the door to exactly what was intended to be prevented by 51-3-17, 1953 Comp. (now repealed). Through adoption of different accounting methods from those used over the years, it would be just as easy to create a profit or surplus as by a revaluation of assets, and neither is to be condoned. *Woodson v. Lee*, 73 N.M. 425, 389 P.2d 196 (1963) (decided under former law).

Agreement to distribute regardless of surplus or net profit. - Any agreement to distribute funds or assets of a corporation to stockholders regardless of surplus or net profit would be in violation of 51-3-17, 1953 Comp. (now repealed), and accordingly void. *Woodson v. Lee*, 73 N.M. 425, 389 P.2d 196 (1963) (decided under former law).

Agreement to distribute only when "income shall be for distribution". - Under an agreement whereby owners of reserved right to oil and gas income from the corporate lands agreed to eliminate the reservation and participate in oil and gas income which corporation received for distribution to stockholders, and where contract stipulated that owners would receive a distribution only when "income shall be for distribution to the stockholders," such a situation could occur only when surplus or net profits were present, and therefore agreement did not violate 51-3-17, 1953 Comp. (now repealed). *Woodson v. Lee*, 73 N.M. 425, 389 P.2d 196 (1963) (decided under former law).

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1168 to 1203.

Dividends on preferred stock, 6 A.L.R. 802; 67 A.L.R. 765; 98 A.L.R. 1526; 133 A.L.R. 653.

Guaranteeing future price of, or dividends on, corporate stock as contrary to public policy, 24 A.L.R. 986.

Right or duty of corporation to pay dividends and liability for wrongful payment, 55 A.L.R. 8; 76 A.L.R. 885; 109 A.L.R. 1381.

Right as between seller and purchaser of stock to dividends declared thereon, 60 A.L.R.

703.

Right of pledgee of stock in respect of dividends, 67 A.L.R. 485; 103 A.L.R. 849.

Failure of purchaser of stock from existing corporation, or of subscriber thereto, to pay for same as affecting his right to dividends, 122 A.L.R. 1048.

Right as between life beneficiaries and remaindermen in corporate dividends or distributions during the life interest, 130 A.L.R. 492; 44 A.L.R.2d 1277.

Right of bankrupt's creditors in unclaimed dividends, 4 A.L.R.2d 1435.

Validity of cancellation of accrued dividends on preferred corporate stock, 8 A.L.R.2d 893.

Overpayments of dividends on preferred stock as deductible in payment of dividends for later years, 10 A.L.R.2d 241.

Parties defendant to stockholder's suit to compel declaration of dividend, 15 A.L.R.2d 1124.

Preferred stockholders' rights, upon liquidation or dissolution, to dividends, 25 A.L.R.2d 788.

Rights of preferred stockholders as to passed or accumulated dividends in going concern, 27 A.L.R.2d 1073.

Action for dividend after refusal of corporation or its agent to register or effectuate transfer of stock, 32 A.L.R.2d 168.

Corporation's right to interplead claimants to dividends, 46 A.L.R.2d 980.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock. 46 A.L.R.3d 7.

18 C.J.S. Corporations §§ 458 to 474.

## **§ 53-11-45. Repealed.**

Repeals. - Laws 1983, ch. 304, § 73, repeals 53-11-45 NMSA 1978, relating to distributions from capital surplus.

Laws 1983, ch. 304 contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

## **§ 53-11-46. Liability of directors in certain cases.**

A. In addition to any other liabilities, a director who votes for or assents to any distribution contrary to the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] or contrary to any restrictions contained in the articles of incorporation shall, unless the director complies with the standard provided in the Business Corporation Act for the performance of the duties of directors, be liable to the corporation, jointly and severally with all other directors so voting or assenting, for the amount of the dividend which is paid or the value of the distribution in excess of the amount of the distribution which could have been made without a violation of the provisions of the Business Corporation Act or the restrictions in the articles of

incorporation.

B. Any director against whom a claim is asserted under this section for the making of a distribution and who shall be held liable thereon, shall be entitled to contribution from the shareholders who accepted or received any such distribution, knowing the distribution to have been made in violation of the Business Corporation Act, in proportion to the amounts received by them.

C. Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from any other director who voted for or assented to the action upon which the claim is asserted and who did not comply with the standard provided in the Business Corporation Act for the performance of the duties of directors.

History: 1953 Comp., § 51-24-45, enacted by Laws 1967, ch. 81, § 45; 1975, ch. 64, § 23; 1983, ch. 304, § 40.

The 1983 amendment redesignated former Paragraph (1) of Subsection A as present Subsection A; deleted former Paragraphs (2) and (3) of Subsection A and former Subsections B and C, which concerned the liability of directors of a corporation who vote for the illegal purchase of its own shares or for the illegal distribution of assets during liquidation, presumed assent to actions taken by the board absent express dissent, and presumption of good faith reliance on financial statements; redesignated former Subsections D and E as present Subsections B and C, respectively; near the beginning of Subsection A deleted "imposed by law upon directors of a corporation" following "liabilities" and substituted "a director who votes for or assents to any distribution" for "directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders," near the middle of Subsection A inserted "unless the director . . . duties of directors," deleted "jointly and severally" preceding "liable" and inserted "jointly and severally with all other directors so voting or assenting," and near the end of Subsection A substituted "distribution" for "assets which are distributed," deleted "dividend or" preceding "distribution," and substituted "made" for "paid or distributed"; substituted "making of a distribution" for "payment of a dividend or other distribution of assets of a corporation" near the beginning of Subsection B; substituted "distribution, knowing the distribution" for "dividend or assets, knowing the dividend or distribution" near the middle of Subsection B; and inserted "or pursuant to" near the beginning of Subsection C, substituted "any other director" for "the other directors" near the middle of Subsection C, and added "and who did not . . . the duties of directors" at the end of Subsection C.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 48 of the ABA Model Business Corporation Act.

Forbidden distributions to stockholders defined. - It is clear that forbidden distributions to shareholders out of capital surplus of a corporation of a portion of its assets, in cash or profits, are those distributions to shareholders of corporate property paid to the corporation by the shareholders in excess of the capital stock liability, which would render the corporation insolvent, would deprive preferential shareholders of accrued dividends to which they were entitled, or would reduce the corporation's assets below the amount preferential shareholders could claim in the event of involuntary liquidation. *Dilaconi v. New Cal Corp.*, 97 N.M. 782, 643 P.2d 1234 (Ct. App. 1982).

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1684 to 1896.

Laches as affecting right of corporation or its stockholders to relief against directors for violation of trust, 10 A.L.R. 370.

Liability of directors or officers of corporation for incurring excessive debts, right of individual creditor to enforce, 43 A.L.R. 1147.

Right of creditor of corporation to maintain, action against directors or officers for mismanagement, 50 A.L.R. 462.

Judgment in action by or against corporation as res judicata in action by or against stockholder or officer of corporation, 129 A.L.R. 1041.

Constitutionality, construction, and application of provision of Securities Exchange Act regarding liability of directors, officers, and principal stockholders for profits on shortswing speculation in corporation's stock, 40 A.L.R.2d 1346.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 A.L.R.3d 500.

Liability of corporate directors or officers for negligence in permitting conversion of property of third persons by corporation, 29 A.L.R.3d 660.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution, 72 A.L.R.4th 419.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another, 72 A.L.R.4th 492.

19 C.J.S. Corporations §§ 761 to 932.

## **§ 53-11-47. Provisions relating to actions by shareholders.**

A. No action shall be brought in this state by a shareholder in the right of a domestic or foreign corporation unless:

(1) the plaintiff was a shareholder of record or the beneficial owner of shares held by a nominee or the holder of voting trust certificates at the time of the transaction of which he complains, or his shares or his beneficial ownership of shares held by a nominee or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder of record at such time;

(2) the complaint be verified; and

(3) the complaint alleges with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and the reasons for his failure to obtain the action or for not making the effort. If the corporation undertakes an investigation upon receipt of a demand by plaintiff for action, or following commencement of suit, the court may stay any action commenced as the circumstances reasonably require.

B. In any action hereafter instituted in the right of any domestic or foreign corporation by the person or persons described in the above paragraph, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action.

C. An action authorized by this section shall not be discontinued, compromised or settled without approval by the court having jurisdiction of the action. If the court determines that the interest of the shareholders or of any class thereof will be substantially affected by the discontinuance, compromise or settlement, the court may direct that notice, by publication or otherwise, be given to the shareholders or any class thereof whose interests it determines will be so affected.

History: 1953 Comp., § 51-24-45.1, enacted by Laws 1975, ch. 64, § 24; 1983, ch. 304, § 41.

The 1983 amendment added "Provisions relating to" at the beginning of the catchline; designated part of former Subsection A as present Paragraph (1) of Subsection A; in Paragraph (1) of Subsection A substituted "shareholder of record or the beneficial owner of shares held by a nominee or the holder" for "holder of record of shares or," deleted "therefor" following "voting trust certificates," and inserted "his beneficial ownership of shares held by a nominee or"; added Paragraphs (2) and (3) of Subsection A; substituted "person or persons described in the above paragraph" for "holder or holders of record of shares of such corporation or of voting trust certificates therefor" near the beginning of Subsection B; and added Subsection C.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2243 to 2252, 2272, 2326 to 2352, 2487, 2491, 2495.

Statute of limitations in stockholder's derivative suit against directors or officers, 123 A.L.R. 346.

18 C.J.S. Corporations §§ 559 to 566.

## **§ 53-11-48. Officers.**

Every corporation organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] shall have officers, with titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws, and as many officers as may be necessary to enable the corporation to sign instruments and stock certificates required under the Business Corporation Act. One of the officers shall have the duty to record the proceedings of the meetings of the members and directors in a book to be kept for that purpose. All officers and agents of the corporation, as between themselves and the corporation, shall have the authority and perform the duties in the management of the corporation as provided in the bylaws or as determined by resolution of the board of directors not inconsistent with the bylaws.

History: 1953 Comp., § 51-24-46, enacted by Laws 1967, ch. 81, § 46; 1989, ch. 385, § 2.

The 1989 amendment, effective June 16, 1989, substituted the present first and second sentences for the former first through third sentences, which read: "The officers of a corporation shall consist of a president, one or more vice presidents as may be prescribed by the bylaws, a secretary and a treasurer, each of whom shall be elected by the board of directors at the time and in the manner prescribed by the bylaws. Other officers and assistant officers and agents deemed necessary may be elected or appointed by the board of directors or chosen in the manner prescribed by the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary."

Compiler's notes. - This section is derived from Section 50 of the ABA Model Business Corporation Act.

Delegation of authority. - Directors may not only delegate authority to transact ordinary and routine business, but also authority to transact business requiring the highest degree of judgment and discretion. Directors cannot, however, delegate entire supervision and control of the corporation. *McKinney v. Gannett Co.* 817 F.2d 659 (10th Cir. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1341 to 1352, 1360 to 1364.

Informality of directors' meetings as affecting election of officers, 64 A.L.R. 716.

Power of president of corporation to have litigation instituted by it where a board of directors has failed or refused to grant permission, 10 A.L.R.2d 701.

Purchase of claims against corporation by officer thereof, 13 A.L.R.2d 1172.

Right of corporate officer to purchase corporate assets from corporation, 24 A.L.R.2d 71.

Power of corporate officer to hire employees for life, 28 A.L.R.2d 940.

Validity of contract between corporations as affected by directors or officers in common, 33 A.L.R.2d 1060.

Authority of officer to bind corporation as guarantor or surety, 34 A.L.R.2d 290.

Authority of corporate officers to endorse and transfer commercial paper, 37 A.L.R.2d 523.

Power of particular officer or agent of business corporation to bind it by a donation to a charity or similar institution, 50 A.L.R.2d 447.

Authority of president to subordinate corporation's claim, assignment, lien, or the like, 53 A.L.R.2d 1421.

Authority of corporate officers to mortgage or pledge corporate personal property, 62 A.L.R.2d 712.

Power of secretary or treasurer of corporation to institute litigation, 64 A.L.R.2d 900.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 A.L.R.3d 500.

Financial inability of corporation to take advantage of business opportunity as affecting determination whether "corporate opportunity" was presented, 16 A.L.R.4th 185.

Purchase of shares of corporation by director or officer as usurpation of "corporate opportunity," 16 A.L.R.4th 784.

Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director, 17 A.L.R.4th 479.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution, 72 A.L.R.4th 419.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another, 72 A.L.R.4th 492.

19 C.J.S. Corporations §§ 721, 752 to 756.

## **§ 53-11-49. Removal of officers.**

Any officer or agent may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed. Election or appointment of an officer or agent shall not of itself create contract rights.

History: 1953 Comp., § 51-24-47, enacted by Laws 1967, ch. 81, § 47.

Compiler's notes. - This section is derived from Section 51 of the ABA Model Business Corporation Act.

Resolution held not to be removal. - A resolution suspending a newspaper executive during the period of litigation between him and the newspaper corporation was not a removal within the meaning of this section. *McKinney v. Gannett Co.* 660 F. Supp. 984 (D.N.M. 1981), appeal dismissed, 694 F.2d 1240 (10th Cir. 1982), aff'd, 817 F.2d 659 (10th Cir. 1987).

Subsequent ratification not curing breach. - Subsequent ratification by the board of directors of its removal of an officer in breach of an employment agreement could not cure the breach. *McKinney v. Gannett Co.* 660 F. Supp. 984 (D.N.M. 1981), appeal dismissed, 694 F.2d 1240 (10th Cir. 1982), aff'd, 817 F.2d 659 (10th Cir. 1987).

Contract rights of person not removed. - The underlying policy of this section giving precedence to contract rights implied that a former newspaper owner who sued a successor newspaper corporation for breach of his contract with the corporation could maintain his contract rights, even though it was another officer who was removed without the former owner's permission. *McKinney v. Gannett Co.* 660 F. Supp. 984 (D.N.M. 1981), appeal dismissed, 694 F.2d 1240 (10th Cir. 1982), aff'd, 817 F.2d 659 (10th Cir. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18B Am. Jur. 2d Corporations §§ 1427 to 1444.

Directors' power to remove officers or fellow directors, 63 A.L.R. 776.

Construction, application and effect of statute empowering removal of officer, agent or employee at pleasure, 111 A.L.R. 894.

Removal by court of director or officer of private corporation, 124 A.L.R. 364.

Bylaw authorizing removal of officer at any time as affecting contract of employment for specified period, 145 A.L.R. 312.

"Golden parachute" defense to hostile corporate takeover, 66 A.L.R.4th 138.

19 C.J.S. Corporations § 738.

## **§ 53-11-50. Books and records; financial reports to shareholders; examination of records.**

A. Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders and board of directors, and shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Any books, records and minutes may be in written form or in any other form capable of being converted into written form within a reasonable time.

B. Any person who shall have been a holder of record of shares or of voting trust

certificates therefor at least six months immediately preceding his demand or who shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent of all the outstanding shares of the corporation, upon written demand stating the purpose thereof, may examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes and record of shareholders and make extracts therefrom. Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder or holder of voting trust certificates, or his agent or attorney, to examine and make extracts from its books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to the shareholder or holder of voting trust certificates in a penalty of ten percent of the value of the shares owned by the shareholder, or in respect of which such voting trust certificates are issued, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has, within two years:

- (1) sold or offered for sale any list of shareholders or of holders of voting trust certificates for shares of the corporation or any other corporation;
- (2) aided or abetted any person in procuring any list of shareholders or of holders of voting trust certificates for any such purpose;
- (3) improperly used any information secured through any prior examination of the books and records of account, or minutes, or records of shareholders or of holders of voting trust certificates for shares of the corporation or any other corporation; or
- (4) not acted in good faith or for a proper purpose in making his demand.

C. Nothing in this section shall impair the power of any court of competent jurisdiction, upon proof by a shareholder or holder of voting trust certificates of proper purpose, irrespective of the period of time during which the shareholder or holder of voting trust certificates shall have been a shareholder of record or a holder of record of voting trust certificates, and irrespective of the number of shares held by him or represented by voting trust certificates held by him, to compel the production for examination by the shareholder or holder of voting trust certificates of the books and records of account, minutes and record of shareholders of a corporation.

D. Each corporation shall provide its shareholders access to at least a balance sheet as of the end of each taxable year and a statement of income for such taxable year, if the corporation prepares such financial statements for such taxable year for any purpose. Such financial statements may be consolidated statements of the corporation and one or more of its subsidiaries, but shall not be required to include the statements' supporting data or information.

History: 1953 Comp., § 51-24-48, enacted by Laws 1967, ch. 81, § 48; 1975, ch. 64, § 25; 1983, ch. 304, § 42.

The 1983 amendment added "Financial reports to shareholders; examination of records" at the end of the catchline, deleted "has" at the beginning of Paragraphs (2) and (3) of Subsection B, substituted "not acted" for "was not acting" at the beginning of Paragraph (4) of Subsection B, and substituted present Subsection D for former Subsection D, which concerned similar subject matter.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 52 of the ABA Model Business Corporation Act.

Section is not a limitation or abrogation of the common-law right of inspection and is sometimes described as an extension or even an enlargement of the right as recognized under the common law. *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 659 P.2d 888 (1983).

Shareholder's right to examine books and records under this section is not unlimited. - The right of examination must be exercised at reasonable and proper times. *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 659 P.2d 888 (1983).

Discretion vested in court to control right of examination. - A trial court must of necessity have some discretion in determining when and in what manner the right of examination should be exercised. *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 659 P.2d 888 (1983).

And imposition of penalty under Subsection B is also within trial court's discretion. *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 659 P.2d 888 (1983).

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 333 to 422.

Jurisdiction of action involving inspection of books of foreign corporation, 18 A.L.R. 1399; 89 A.L.R. 736; 155 A.L.R. 1231; 72 A.L.R.2d 1211.

Stockholder's right to inspect books and records of corporation, 22 A.L.R. 24; 43 A.L.R. 783; 59 A.L.R. 1373; 80 A.L.R. 1502; 174 A.L.R. 262; 15 A.L.R.2d 11.

Creditor's right to inspect books and records under constitutional or statutory provision relating specifically to corporations, 35 A.L.R. 752.

Power of equity to appoint receiver at instance of stockholder, because of refusal of officers to permit inspection of books, 43 A.L.R. 977; 46 A.L.R. 976; 62 A.L.R. 411; 77 A.L.R. 861; 98 A.L.R. 1264.

Right of stockholder or creditor to inspect record of corporation in hands of receiver, 92 A.L.R. 1047.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 A.L.R.2d 862.

What corporate documents are subject to shareholder's right of inspection, 88 A.L.R.3d 663.

18 C.J.S. Corporations §§ 501 to 510.

### **§ 53-11-51. Shares held for account.**

A. If the articles of incorporation or the bylaws so provide, the board of directors may adopt by resolution a procedure whereby a shareholder of the corporation may certify in writing to the corporation that all or a portion of the shares registered in the name of such shareholder are held for the account of a specified person or persons. The resolution shall set forth:

- (1) the types or groups of shareholders who may certify;
- (2) the purpose or purposes for which the certification may be made;
- (3) the form of certification and information to be contained therein;
- (4) the deadline, if any, within which the certification must be received by the corporation; and
- (5) such other provisions with respect to the procedure as are deemed necessary or desirable.

B. Upon receipt by the corporation of a certification complying with the procedure, the persons specified in the certification shall be deemed, for the purpose or purposes set forth in the certification, to be the holders of record of the number of shares specified in place of the shareholder making the certification.

History: 1953 Comp., § 51-24-49, enacted by Laws 1975, ch. 64, § 26.

## **Article 12**

### **Business Corporations; Formation of Corporations**

## **§ 53-12-1. Incorporators.**

One or more persons, or a domestic or foreign corporation, may act as incorporator or incorporators of a corporation by signing and delivering in duplicate to the commission articles of incorporation for the corporation.

History: 1953 Comp., § 51-25-1, enacted by Laws 1967, ch. 81, § 49.

Compiler's notes. - This section is derived from Section 53 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 189, 190. Liability of attorney for improper or ineffective incorporation of client, 40 A.L.R.4th 535. 18 C.J.S. Corporations §§ 35, 36.

## **§ 53-12-2. Articles of incorporation.**

A. The articles of incorporation shall set forth:

- (1) the name of the corporation;
- (2) the period of duration, if other than perpetual;
- (3) the purpose or purposes for which the corporation is organized, which may include the transaction of any lawful business for which corporations may be incorporated under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978];
- (4) the aggregate number of shares which the corporation shall have authority to issue and, if the shares are to be divided into classes, the number of shares of each class;
- (5) if the shares are to be divided into classes, the designation of each class and a statement of the preferences, limitations and relative rights in respect of the shares of each class;
- (6) if the corporation is to issue the shares of any preferred or special class in series, then the designation of each series and a statement of the variations in the relative rights and preferences as between series insofar as they are to be fixed in the articles of incorporation, and a statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences as between series;
- (7) any provision limiting or denying to shareholders the preemptive right to acquire unissued shares, or securities convertible into such shares or carrying a right to subscribe to or acquire shares;

(8) the address of its initial registered office, and the name of its initial registered agent at the address;

(9) the number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify; and

(10) the name and address of each incorporator.

B. In addition to provisions required therein, the articles of incorporation may also contain provisions not inconsistent with law regarding:

(1) the direction of the management of the business and the regulation of the affairs of the corporation;

(2) the definition, limitation and regulation of the powers of the corporation, the directors and the shareholders, or any class of the shareholders, including restrictions on the transfer of shares;

(3) the minimum consideration for any authorized shares or class of shares; and

(4) any provision which under the Business Corporation Act is required or permitted to be set forth in the bylaws.

C. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in the Business Corporation Act.

D. The articles of incorporation may set forth any provision which the incorporators elect to set forth for the regulation of the internal affairs of the corporation.

E. The articles of incorporation may provide that a director shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director unless:

(1) the director has breached or failed to perform the duties of the director's office in compliance with Subsection B of Section 53-11-35 NMSA 1978; and

(2) the breach or failure to perform constitutes:

(a) negligence, willful misconduct or recklessness in the case of a director who has either an ownership interest in the corporation or receives in his capacity as a director or as an employee of the corporation compensation of more than two thousand dollars (\$2,000) from the corporation in any calendar year; or

(b) willful misconduct or recklessness in the case of a director who does not have an

ownership interest in the corporation and does not receive in his capacity as director or as an employee of the corporation compensation of more than two thousand dollars (\$2,000) from the corporation in any calendar year.

Such a provision in the articles of incorporation shall, however, only eliminate the liability of a director for action taken as a director or any failure to take action as a director at meetings of the board of directors or of a committee of the board of directors, or by virtue of action of the directors without a meeting pursuant to Section 53-11-43 NMSA 1978, on or after the date when such provision in the articles of incorporation becomes effective.

History: 1953 Comp., § 51-25-2, enacted by Laws 1967, ch. 81, § 50; 1975, ch. 64, § 27; 1983, ch. 304, § 43; 1987, ch. 238, § 12; 1988, ch. 39, § 1.

The 1983 amendment substituted "and," for "; if the shares are to consist of one class only, the par value of each of the shares, or a statement that all of the shares are without par value; or," near the middle of Paragraph (4) of Subsection A, deleted "and a statement of the par value of the shares of each class or that the shares are to be without par value" at the end of Paragraph (4) of Subsection A, deleted "or treasury" preceding "shares" near the beginning of Paragraph (7) of Subsection A, added present Subsection B, and redesignated former Subsections B and C as present Subsections C and D, respectively.

The 1987 amendment, effective April 9, 1987, added Subsection E.

The 1988 amendment, effective May 18, 1988, deleted "negligence, willful misconduct or recklessness" after "constitutes" in Subsection E(2) and added Subsections E(2)(a) and (b).

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 54 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 199 to 206.

Validity of restriction on transfer of stock in articles of incorporation, 65 A.L.R. 1159; 61 A.L.R.2d 1318.

Validity and construction of corporate articles or bylaws relating to stock held by one retiring from corporate office or employment, 66 A.L.R. 1295.

Conclusiveness of charter as regards character, kind or purposes of corporation, 119 A.L.R. 1012.

Conclusiveness, as regards venue, of designation in incorporation papers of place of business, 175 A.L.R. 1092.

Construction and effect of corporate articles, charter, or bylaws limiting duration or maturity of its indebtedness, 55 A.L.R.2d 949.

18 C.J.S. Corporations §§ 52, 53, 55.

### **§ 53-12-3. Filing of articles of incorporation.**

A. Duplicate originals of the articles of incorporation and an affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the designated registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation shall be delivered to the commission. If the commission finds that the articles of incorporation and the affidavit conform to law, it shall, when all fees and franchise taxes have been paid:

(1) endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing thereof;

(2) file one of the duplicate originals and the affidavit in its office; and

(3) issue a certificate of incorporation to which it shall affix the other duplicate original.

B. The certificate of incorporation, together with the duplicate original of the articles of incorporation affixed thereto by the commission, shall be returned to the incorporators or their representative.

History: 1953 Comp., § 51-25-3, enacted by Laws 1967, ch. 81, § 51; 1977, ch. 103, § 12.

Compiler's notes. - This section is derived from Section 55 of the ABA Model Business Corporation Act.

No requirement to file with county clerks. - No requirement exists in this provision for filing or recording articles of incorporation, or amendments, with the county clerks. 1968 Op. Att'y Gen. No. 68-108.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 208 to 213.

18 C.J.S. Corporations §§ 51, 59.

### **§ 53-12-4. Effect of incorporation.**

Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, upon delivery of the articles of incorporation to the commission, the corporate existence shall begin, and the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], except as against this state in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

History: 1953 Comp., § 51-25-4, enacted by Laws 1967, ch. 81, § 52; 1983, ch. 304, § 44.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "issuance of certificate of" preceding "incorporation" in the catchline and substituted "Unless the commission . . . to the commission," for "Upon the issuance of the certificate of incorporation," at the beginning of the section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 56 of the ABA Model Business Corporation Act.

Statutory conditions to be met after incorporation are conditions subsequent. - Statutory conditions to the right to engage in business, to be performed after the corporation has been formed, are conditions subsequent, and while noncompliance therewith may give the state a right to proceed to forfeit the franchise, such noncompliance in the absence of such proceeding does not in anywise affect the legal existence of the corporation. *Scott Graphics, Inc. v. Mahaney*, 89 N.M. 208, 549 P.2d 623 (Ct. App.), cert. denied, 89 N.M. 322, 551 P.2d 1369 (1976).

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 67.  
18 C.J.S. Corporations § 77.

## **§ 53-12-5. Organization meeting of directors.**

After the issuance of the certificate of incorporation, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this state, at the call of a majority of the directors named in the articles of incorporation, for the purpose of adopting bylaws, electing officers and the transaction of other business as may come before the meeting. The directors calling the meeting shall give at least three days' notice thereof by mail to each director so named, stating the time and place of the meeting.

History: 1953 Comp., § 51-25-6, enacted by Laws 1967, ch. 81, § 54; 1975, ch. 64, § 28.

Compiler's notes. - This section is derived from Section 57 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 220, 221.

## **Article 13**

### **Business Corporations; Amendment of Articles of Incorporation**

#### **§ 53-13-1. Right to amend articles of incorporation.**

A corporation may amend its articles of incorporation from time to time in as many respects as may be desired, so long as its articles of incorporation, as amended, contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making the amendment, and, if a change in shares or the rights of shareholders, or an exchange, reclassification or cancellation of shares or rights of shareholders is to be made, provisions as may be necessary to effect the change, exchange, reclassification or cancellation. In particular, and without limitation upon the general power of amendment, a corporation may amend its articles of incorporation from time to time to:

- A. change its corporate name;
- B. change its period of duration;
- C. change, enlarge or diminish its corporate purposes;

- D. increase or decrease the aggregate number of shares or shares of any class which the corporation has authority to issue;
- E. provide or eliminate any provision with respect to the minimum consideration for any shares or class of shares;
- F. exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued;
- G. change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, limitations and the relative rights in respect of all or any part of its shares, whether issued or unissued;
- H. change the shares of any class, whether issued or unissued, into a different number of shares of the same class or into the same or a different number of shares of other classes;
- I. create new classes of shares having rights and preferences, either prior and superior or subordinate and inferior, to the shares of any class then authorized, whether issued or unissued;
- J. cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared;
- K. divide any preferred or special class of shares, whether issued or unissued, into series and fix and determine the designation of the series and the variations in the relative rights and preferences as between the shares of the series;
- L. authorize the board of directors to establish, out of authorized but unissued shares, series of any preferred or special class of shares and fix and determine the relative rights and preferences of the shares of any series so established;
- M. authorize the board of directors to fix and determine the relative rights and preferences of the authorized but unissued shares of series theretofore established in respect of which either the relative rights and preferences have not been fixed and determined or the relative rights and preferences theretofore fixed and determined are to be changed;
- N. revoke, diminish or enlarge the authority of the board of directors to establish series out of authorized but unissued shares of any preferred or special class and fix and determine the relative rights and preferences of the shares of any series so established;  
or
- O. limit, deny or grant to shareholders of any class the preemptive right to acquire additional shares of the corporation, whether then or thereafter authorized.

History: 1953 Comp., § 51-26-1, enacted by Laws 1967, ch. 81, § 55; 1983, ch. 304, § 45.

The 1983 amendment rewrote Subsection E, which formerly read "increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued," deleted former Subsection H, relating to changing shares with par value into shares without par value and vice versa, redesignated former Subsection I as present Subsection H, deleted "and whether with or without par value" preceding "into a different number" and deleted "either with or without par value" preceding "of other classes" in Subsection H, redesignated former Subsections J to P as present Subsections I to O, respectively, and deleted "or treasury" preceding "shares" in Subsection O.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 58 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations §§ 76 to 95. Power of corporation to amend its charter in respect of character or kind of business, 111 A.L.R. 1525.  
18 C.J.S. Corporations §§ 80 to 85.

## **§ 53-13-2. Procedure to amend articles of incorporation.**

Amendments to the articles of incorporation shall be made in the following manner:

A. if shares have been issued, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either the annual or a special meeting. If no shares have been issued, the amendment shall be adopted by resolution of the board of directors, and the provisions for adoption by shareholders shall not apply. If the corporation has only one class of shares outstanding, an amendment solely to change the number of authorized shares to effectuate a split of, or stock dividend in, the corporation's own shares, or solely to do so and to change the number of authorized shares in proportion thereto, may be adopted by the board of directors; and the provisions for adoption by shareholders shall not apply, unless otherwise provided by the articles of incorporation.

The resolution may incorporate the proposed amendment in restated articles of incorporation which contain a statement that, except for the designated amendment, the restated articles of incorporation correctly set forth without change the corresponding provisions of the articles of incorporation as theretofore amended and that the restated articles of incorporation together with the designated amendment supersede the original articles of incorporation and all amendments thereto;

B. written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for the giving of notice of meetings of shareholders. If the meeting is an annual meeting, the proposed amendment or the summary may be included in the notice of the annual meeting; and

C. at the meeting, a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon. Any number of amendments may be submitted to the shareholders and voted upon by them at one meeting.

History: 1953 Comp., § 51-26-2, enacted by Laws 1967, ch. 81, § 56; 1975, ch. 64, § 29; 1983, ch. 304, § 46.

Cross-references. - As to applicability of lowered voting requirements to existing corporations, see 53-18-6.1 NMSA 1978.

The 1983 amendment added the present third sentence of Subsection A and substituted "a majority" of "two-thirds" in two places in the second sentence of Subsection C.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 59 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Corporations § 95.

### **§ 53-13-3. Class voting on amendments.**

The holders of the outstanding shares of a class may vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles of incorporation, if the amendment would:

- A. increase or decrease the aggregate number of authorized shares of the class;
- B. effect an exchange, reclassification or cancellation of all or part of the shares or the class;
- C. effect an exchange or create a right of exchange of all or any part of the shares of another class into the shares of the class;
- D. change the designations, preferences, limitations or relative rights of the shares of the class;
- E. change the shares of the class into the same or a different number of shares of the same class or another class;
- F. create a new class of shares having rights and preferences prior and superior to the shares of the class or increase the rights and preferences or the number of authorized shares of any class having rights and preferences prior or superior to the shares of the class;
- G. in the case of a preferred or special class of shares, divide the shares of the class into series and fix and determine the designation of the series and the variations in the relative rights and preferences between the shares of the series or authorize the board of directors to do so;
- H. limit or deny the existing preemptive rights of the shares of the class; or
- I. cancel or otherwise affect dividends on the shares of the class which have accrued but have not been declared.

History: 1953 Comp., § 51-26-3, enacted by Laws 1967, ch. 81, § 57; 1975, ch. 64, § 30; 1983, ch. 304, § 47.

The 1983 amendment redesignated former Subsections C to J as present Subsections B to I, respectively, deleted former Subsection B, which read "increase or decrease the par value of the shares of the class" deleted "whether with or without par value," preceding "into" and deleted "either with or without par value" preceding "of the same" in Subsection E, and deleted "or classes" at the end of Subsection E.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 60 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 C.J.S. Corporations § 81.

### **§ 53-13-4. Articles of amendment.**

The articles of amendment shall be executed in duplicate by the corporation by its chairman of the board, president or a vice president and by its secretary or an assistant secretary and verified by one of the officers signing the articles and shall set forth:

A. the name of the corporation;

B. the amendment so adopted;

C. the date of the adoption of the amendment by the shareholders or by the board of directors where no shares have been issued;

D. the number of shares outstanding, and the number of shares entitled to vote thereon and, if the shares of any class are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each class;

E. the number of shares voted for and against the amendment, respectively, and, if the shares of any class are entitled to vote thereon as a class, the number of shares of each class voted for and against the amendment, respectively, or if no shares have been issued, a statement to that effect; and

F. if the amendment provides for an exchange, reclassification or cancellation of issued shares and if the manner in which they shall be effected is not set forth in the amendment, then a statement of the manner in which they shall be effected.

History: 1953 Comp., § 51-26-4, enacted by Laws 1967, ch. 81, § 58; 1975, ch. 64, § 31; 1983, ch. 304, § 48.

The 1983 amendment inserted "chairman of the board," near the middle of the introductory language and deleted former Subsection G, which read "if the amendment effects a change in the amount of stated capital, then a statement of the manner in

which it is effected and a statement, expressed in dollars, of the amount of stated capital as changed by the amendment" and made other minor changes.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 61 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

### **§ 53-13-5. Filing of articles of amendment.**

A. Duplicate originals of the articles of amendment shall be delivered to the commission. If the commission finds that the articles of amendment conform to law, it shall, when all fees have been paid:

(1) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

(2) file one of the duplicate originals in its office; and

(3) issue a certificate of amendment to which it shall affix the other duplicate original.

B. The certificate of amendment, together with the duplicate original of the articles of amendment affixed thereto by the commission, shall be returned to the corporation or its representative.

History: 1953 Comp., § 51-26-5, enacted by Laws 1967, ch. 81, § 59; 1983, ch. 304, § 49.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "and franchise taxes" following "fees" in the last sentence of the introductory language of Subsection A.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 62 of the ABA Model Business Corporation Act.

No requirement to file with county clerk. - No requirement exists in this section for filing the amendments with the county clerks. 1968 Op. Att'y Gen. No. 68-108.

### **§ 53-13-6. Effect of certificate of amendment.**

Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, the amendment shall become effective upon delivery of the articles of amendment to the commission or on such later date, not more than thirty days subsequent to the delivery thereof to the commission, as shall be provided for in the articles of amendment. No amendment shall affect any existing cause of action in favor of or against the corporation or any pending suit to which the corporation is a party or the existing rights of persons other than shareholders; and, in the event the corporate name is changed by amendment, no suit brought by or against the corporation under its former name shall abate for that reason.

History: 1953 Comp., § 51-26-6, enacted by Laws 1967, ch. 81, § 60; 1983, ch. 304, § 50.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment rewrote the first sentence, which formerly read: "Upon the issuance of the certificate of amendment by the commission, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly."

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 63 of the ABA Model Business Corporation Act.

### **§ 53-13-7. Restated articles of incorporation.**

A. A domestic corporation may at any time restate its articles of incorporation, as theretofore amended, by a resolution adopted by the board of directors.

B. Upon the adoption of such resolution, restated articles of incorporation shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or assistant secretary and verified by one of the officers signing the articles, and shall set forth all of the operative provisions of the articles of incorporation as theretofore amended together with a statement that the restated articles of incorporation correctly set forth without change the corresponding provisions of the articles of incorporation as theretofore amended and that the restated articles of incorporation

supersede the original articles of incorporation and all amendments thereto.

C. Duplicate originals of the restated articles of incorporation shall be delivered to the commission. If the commission finds that the restated articles of incorporation conform to law, it shall, when all fees have been paid:

(1) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

(2) file one of the duplicate originals in its office; and

(3) issue a restated certificate of incorporation to which it shall affix the other duplicate original.

D. The restated certificate of incorporation, together with the duplicate original of the restated articles of incorporation affixed thereto by the commission, shall be returned to the corporation or its representative. Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, upon delivery of the restated articles of incorporation to the commission, the restated articles of incorporation shall become effective and shall supersede the original articles of incorporation and all amendments thereto.

History: 1953 Comp., § 51-26-7, enacted by Laws 1975, ch. 64, § 32; 1983, ch. 304, § 51.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "and franchise taxes" following "fees" near the end of the last sentence of the introductory language of Subsection C and substituted "Unless the commission . . . to the commission," for "Upon the issuance of the restated certificate of incorporation by the commission," at the beginning of the last sentence of Subsection D.

Repeals and reenactments. - Laws 1975, ch. 64, § 32 repealed former 51-26-7, 1953 Comp., relating to adoption of resolution of restated articles of incorporation by board of directors and submission of such resolution to a shareholder vote, and enacted the above section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived in part from Section 64 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

## **§ 53-13-8. Amendment of articles of incorporation in reorganization proceedings.**

A. Whenever a plan of reorganization of a corporation has been confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of the corporation, pursuant to the provisions of any applicable statute of the United States relating to reorganizations of corporations, the articles of incorporation of the corporation may be amended, in the manner provided in this section, in as many respects as necessary to carry out the plan and put it into effect, so long as the articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation at the time of making the amendment. In particular and without limitation upon general power of amendment, the articles of incorporation may be amended for such purpose to:

- (1) change the corporate name, period of duration or corporate purposes of the corporation;
- (2) repeal, alter or amend the bylaws of the corporation;
- (3) change the aggregate number of shares or shares of any class which the corporation has authority to issue;
- (4) change the preferences, limitations and relative rights in respect of all or any part of the shares of the corporation and classify, reclassify or cancel all or any part thereof, whether issued or unissued;
- (5) authorize the issuance of bonds, debentures or other obligations of the corporation, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class, and fix the terms and conditions thereof; and
- (6) constitute or reconstitute and classify or reclassify the board of directors of the corporation and appoint directors and officers in place of, or in addition to, all or any of the directors or officers then in office.

B. Amendments to the articles of incorporation pursuant to this section shall be made in the following manner:

- (1) articles of amendment approved by decree or order of court shall be executed and verified in duplicate by the person the court designates or appoints for the purpose and shall set forth the name of the corporation, the amendments of the articles of incorporation approved by the court, the date of the decree or order approving the articles of amendment, the title of the proceedings in which the decree or order was entered and a statement that the decree or order was entered by a court having jurisdiction of the proceedings for the reorganization of the corporation pursuant to the

provisions of an applicable statute of the United States;

(2) duplicate originals of the articles of amendment shall be delivered to the commission. If the commission finds that the articles of amendment conform to law, it shall, when all fees have been paid:

(a) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

(b) file one of the duplicate originals in its office; and

(c) issue a certificate of amendment to which it shall affix the other duplicate original; and

(3) the certificate of amendment, together with the duplicate original of the articles of amendment affixed thereto by the commission, shall be returned to the corporation or its representative. Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, the amendment shall become effective upon delivery of the articles of amendment to the commission or on such later date, not more than thirty days subsequent to the delivery thereof to the commission, as shall be provided for in the articles of amendment without any action thereon by the directors or shareholders of the corporation and with the same effect as if the amendments had been adopted by unanimous action of the directors and shareholders of the corporation.

History: 1953 Comp., § 51-26-8, enacted by Laws 1967, ch. 81, § 62; 1983, ch. 304, § 52.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "or persons" following "person" near the beginning of Paragraph (1) of Subsection B, deleted "and franchise taxes" following "fees" in the last sentence of the introductory language of Paragraph (2) of Subsection B, substituted "Unless the commission . . . 53-18-2 NMSA 1978," for "Upon the issuance of the certificate of amendment by the commission," at the beginning of the last sentence of Paragraph (3) of Subsection B, and substituted "upon delivery of . . . in the articles of amendment" for "and the articles of incorporation shall be deemed to be amended accordingly," near the middle of the last sentence of Paragraph (3) of Subsection B.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 65 of the ABA Model Business Corporation Act.

§§ 53-13-9 to 53-13-12. Repealed.

Repeals. - Laws 1983, ch. 304, § 73 repeals 53-13-9 to 53-13-12 NMSA 1978, relating to restrictions on redemption or purchase of redeemable shares, cancellation of redeemable shares by redemption or purchase, cancellation of other reacquired shares, and reduction of stated capital in certain cases, respectively.

Laws 1983, ch. 304, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-13-13. Procedure for share exchange.**

All the issued or all the outstanding shares of one or more classes of any domestic corporation may be acquired through the exchange of all such shares of such class or classes by another domestic corporation pursuant to a plan of exchange approved in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of exchange setting forth:

- A. the name of the corporation the shares of which are proposed to be acquired by exchange and the name of the corporation to acquire the shares of such corporation in the exchange, which is hereinafter designated as the acquiring corporation;
- B. the terms and conditions of the proposed exchange;
- C. the manner and basis of exchanging the shares to be acquired for shares, obligations or other securities of the acquiring corporation or any other corporation, or, in whole or in part, for cash or other property; and
- D. such other provisions with respect to the proposed exchange as are deemed necessary or desirable.

The procedure authorized by this section shall not be deemed to limit the power of a corporation to acquire all or part of the shares of any class or classes of a corporation through a voluntary exchange or otherwise by agreement with the shareholders.

History: 1978 Comp., § 53-13-13, enacted by Laws 1983, ch. 304, § 53.

Repeals and reenactments. - Laws 1983, ch. 304, § 53, repeals former 53-13-13 NMSA 1978, relating to special provisions relating to surplus and reserves, and enacts the above section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

## **Article 14**

## **Business Corporations; Mergers and Consolidations**

### **§ 53-14-1. Procedure for merger.**

Any two or more domestic corporations may merge into one of the corporations pursuant to a plan of merger approved in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

- A. the names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the "surviving corporation";
- B. the terms and conditions of the proposed merger;
- C. the manner and basis of converting the shares of each corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property;
- D. a statement of any changes in the articles of incorporation of the surviving corporation to be effected by the merger; and
- E. other provisions with respect to the proposed merger as deemed necessary or desirable.

History: 1953 Comp., § 51-27-1, enacted by Laws 1967, ch. 81, § 68; 1973, ch. 153, § 1; 1975, ch. 64, § 33.

Cross-references. - As to consolidation or merger of professional corporation, see 53-6-13 NMSA 1978.

Compiler's notes. - This section is derived from Section 71 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2503, 2608, 2614, 2615.

Constitutional and statutory provisions relating to consolidation, merger, or reorganization of corporations as applicable retrospectively to corporation previously

chartered, 131 A.L.R. 734.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

"Golden parachute" defense to hostile corporate takeover, 66 A.L.R.4th 138.

Lockup option defense to hostile corporate takeover, 66 A.L.R.4th 180.

Standing of private party under § 16 of Clayton Act (15 U.S.C.S. § 26) to seek injunction to prevent merger or acquisition allegedly prohibited under § 7 of the act (15 U.S.C.S. § 18), 78 A.L.R. Fed. 159.

19 C.J.S. Corporations §§ 1605, 1617 to 1625.

## **§ 53-14-2. Procedure for consolidation.**

Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]. The board of directors of each corporation shall, by a resolution adopted by each such board, approve a plan of consolidation setting forth:

A. the names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the "new corporation";

B. the terms and conditions of the proposed consolidation;

C. the manner and basis of converting the shares of each corporation into shares, obligations or other securities of the new corporation or any other corporation or, in whole or in part, into cash or other property;

D. with respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under the Business Corporation Act; and

E. other provisions with respect to the proposed consolidation as deemed necessary or desirable.

History: 1953 Comp., § 51-27-2, enacted by Laws 1967, ch. 81, § 69; 1975, ch. 64, § 34.

Compiler's notes. - This section is derived from Section 72 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2503, 2608, 2614, 2615.

Constitutional and statutory provisions relating to consolidation, merger or reorganization of corporations as applicable retrospectively to corporations previously chartered, 131 A.L.R. 734.

19 C.J.S. Corporations §§ 1605, 1617 to 1625.

### **§ 53-14-3. Approval by shareholders.**

A. The board of directors of each corporation in the case of a merger or consolidation, and the board of directors of the corporation the shares of which are to be acquired in the case of an exchange, upon approving a plan of merger, consolidation or exchange, shall, by resolution, direct that the plan be submitted to a vote at a meeting of its shareholders, which may be either an annual or a special meeting. Written notice shall be given to each shareholder of record, whether or not entitled to vote at the meeting, not less than twenty days before the meeting in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for the giving of notice of meetings of shareholders and, whether the meeting is an annual or a special meeting, shall state that the purpose or one of the purposes is to consider the proposed plan. A copy or a summary of the plan shall be included in or enclosed with the notice.

B. At each meeting, a vote of the shareholders shall be taken on the proposed plan. The plan shall be approved upon receiving the affirmative vote of the holders of a majority of the shares entitled to vote thereon of each such corporation, unless any class of shares of any such corporation is entitled to vote thereon as a class, in which event, as to such corporation, the plan shall be approved upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon. Any class of shares of any such corporation shall be entitled to vote as a class if any such plan contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class and, in the case of an exchange, if the class is included in the exchange.

C. After such approval by a vote of the shareholders of each such corporation and at any time prior to the filing of the articles of merger or consolidation or exchange, the merger or consolidation or exchange may be abandoned pursuant to provisions therefor, if any, set forth in the plan.

D.(1) Notwithstanding the provisions of Subsections A and B of this section, submission of a plan of merger to a vote at a meeting of shareholders of a surviving corporation shall not be required if:

(a) the articles of incorporation of the surviving corporation do not differ except in name from those of the corporation before the merger;

(b) each holder of shares of the surviving corporation which were outstanding

immediately before the effective date of the merger is to hold the same number of shares with identical rights immediately after;

(c) the number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable on conversion of other securities issued by virtue of the terms of the merger and on exercise of rights and warrants so issued, will not exceed by more than twenty percent the number of voting shares outstanding immediately before the merger; and

(d) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable on conversion of other securities issued by virtue of the terms of the merger and on exercise of rights and warrants so issued, will not exceed by more than twenty percent the number of participating shares outstanding immediately before the merger.

(2) As used in this subsection:

(a) "voting shares" means shares which entitle their holders to vote unconditionally in election of directors; and

(b) "participating shares" means shares which entitle their holders to participate without limitations in distribution of earnings or surplus.

History: 1953 Comp., § 51-27-3, enacted by Laws 1967, ch. 81, § 70; 1983, ch. 304, § 54.

Cross-references. - As to applicability of lowered voting requirements to existing corporations, see 53-18-6.1 NMSA 1978.

The 1983 amendment inserted "in the case of . . . of an exchange," inserted "or exchange" following "consolidation" and inserted "its" preceding "shareholders" in the first sentence of Subsection A, deleted "of merger or consolidation" following "plan" in the second and last sentences of Subsection A; deleted "of merger or consolidation" following "plan" in the first sentence and in two places in the second sentence of Subsection B; substituted "a majority" for "two-thirds" in two places in the second sentence of Subsection B; substituted "any such plan" for "the plan of merger or consolidation, as the case may be" and added "and, in the case of an exchange, if the class is included in the exchange" at the end of the last sentence of Subsection B; inserted "such" preceding "corporation," inserted "or exchange" in two places, and deleted "of merger or consolidation" following "plan" in Subsection C; and added Subsection D.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 73 of the ABA Model Business Corporation Act.

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2612, 2618.

Status of owners of nonregistered stock as "stockholders" within state statute relating to merger or consolidation or reorganization of corporation, or sale of its entire assets, 158 A.L.R. 983.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

19 C.J.S. Corporations § 1611.

### **§ 53-14-4. Articles of merger, consolidation or exchange.**

A. Upon receiving the approvals required by Sections 53-14-1, 53-14-2 and 53-14-3 NMSA 1978, articles of merger or articles of consolidation shall be executed in duplicate by each corporation by its chairman of the board, president or a vice president and by its secretary or an assistant secretary and verified by one of the officers of each corporation signing the articles and shall set forth:

(1) the plan of merger or the plan of consolidation;

(2) as to each corporation, either:

(a) the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class; or

(b) a statement that the vote of shareholders is not required by virtue of Subsection D of Section 53-14-3 NMSA 1978;

(3) as to each corporation the approval of whose shareholders is required, the number of shares voted for and against the plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the plan, respectively; and

(4) as to the acquiring corporation in a plan of exchange, a statement that the adoption plan and performance of its terms were duly approved by its board of directors and such other requisite corporate action, if any, as may be required of it.

B. Duplicate originals of the articles of merger, consolidation or exchange shall be delivered to the commission. If the commission finds that the articles conform to law, it shall, when all fees have been paid:

(1) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

(2) file one of the duplicate originals in its office; and

(3) issue a certificate of merger, consolidation or exchange to which it shall affix the other duplicate original.

C. The certificate of merger, consolidation or exchange, together with the duplicate original of the articles affixed thereto by the commission, shall be returned to the surviving, new or acquiring corporation, as the case may be, or its representative.

History: 1953 Comp., § 51-27-4, enacted by Laws 1967, ch. 81, § 71; 1983, ch. 304, § 55.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment inserted "or exchange" following "consolidation" in the catchline, in the first sentence of the introductory language of Subsection B, in Paragraph (3) of Subsection B, and in Subsection C; substituted "Upon receiving . . . NMSA 1978" for "Upon approval" at the beginning of the introductory language of Subsection A, inserted "the plan" preceding "of consolidation" in Paragraph (1) of Subsection A, designated former Paragraph (2) of Subsection A as present Subparagraph (a) of Paragraph (2) and the introductory language of Paragraph (2), adding "either" to the end of the introductory language, added Subparagraph (b) of Paragraph (2) of Subsection A, inserted "the approval of whose shareholders is required" in Paragraph (3) of Subsection A, added Paragraph (4) of Subsection A, deleted "and franchise taxes" following "fees" in the last sentence of the introductory language of Subsection B, deleted "of merger or consolidation" preceding "affixed" near the middle of Subsection C, and inserted "or acquiring" near the end of Subsection C, and made other minor changes.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 74 of the ABA Model Business Corporation Act.

### **§ 53-14-5. Merger of subsidiary corporation.**

A. Any corporation owning at least ninety percent of the outstanding shares of each class of another corporation may merge the other corporation into itself without approval by a vote of the shareholders of either corporation. Its board of directors shall by

resolution approve a plan of merger setting forth:

(1) the name of the subsidiary corporation and the name of the corporation owning at least ninety percent of its shares, which is hereinafter designated as the "surviving corporation;" and

(2) the manner and basis of converting the shares of the subsidiary corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property.

B. A copy of the plan of merger shall be mailed to each shareholder of record of the subsidiary corporation.

C. Articles of merger shall be executed in duplicate by the surviving corporation by its president or a vice president and by its secretary or an assistant secretary and verified by one of its officers signing the articles and shall set forth:

(1) the plan of merger;

(2) the number of outstanding shares of each class of the subsidiary corporation and the number of such shares of each class owned by the surviving corporation; and

(3) the date of the mailing to shareholders of the subsidiary corporation of a copy of the plan of merger.

D. On and after the thirtieth day after the mailing of a copy of the plan of merger to shareholders of the subsidiary corporation or upon the waiver thereof by the holders of all outstanding shares, duplicate originals of the articles of merger shall be delivered to the commission. If the commission finds that the articles conform to law, it shall, when all fees have been paid:

(1) endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

(2) file one of the duplicate originals in its office; and

(3) issue a certificate of merger to which it shall affix the other duplicate original.

E. The certificate of merger, together with the duplicate original of the articles of merger affixed thereto by the commission, shall be returned to the surviving corporation or its representative.

History: 1953 Comp., § 51-27-5, enacted by Laws 1967, ch. 81, § 72; 1975, ch. 64, § 35; 1983, ch. 304, § 56.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "and franchise taxes" following "fees" in the last sentence of the introductory language of Subsection D.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 75 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

### **§ 53-14-6. Effect of merger, consolidation or exchange.**

Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, a merger, consolidation or exchange shall become effective upon delivery of the articles of merger, consolidation or exchange to the commission or on such later date, not more than thirty days subsequent to the delivery thereof to the commission, as shall be provided for in the plan. When a merger or consolidation has become effective:

A. the several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

B. the separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

C. the surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978];

D. the surviving or new corporation shall thereupon possess all the rights, privileges, immunities and franchises of a public or private nature of each of the merging or consolidating corporations; and all property, real, personal and mixed and all debts due on whatever account, including subscriptions to shares, and all other choses in action and every other interest of, or belonging to, or due to, each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed, and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of the merger or consolidation;

E. the surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated, and

any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation;

F. in the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger, and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under the Business Corporation Act shall be deemed to be the original articles of incorporation of the new corporation; and

G. when a merger, consolidation or exchange has become effective, the shares of the corporation or corporations party to the plan that are, under the terms of the plan, to be converted or exchanged shall cease to exist, in the case of a merger or consolidation, or be deemed to be exchanged, in the case of an exchange, and the holders of such shares shall thereafter be entitled only to the shares, obligations, other securities, cash or other property into which they shall have been converted or for which they shall have been exchanged, in accordance with the plan, subject to any rights under Section 53-14-4 NMSA 1978.

History: 1953 Comp., § 51-27-6, enacted by Laws 1967, ch. 81, § 73; 1983, ch. 304, § 57.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment rewrote the first sentence of the introductory language, substituted "a" for "the" and substituted "become effective" for "been effected" in the last sentence of the introductory language, and added Subsection G, and made other minor changes.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 76 of the ABA Model Business Corporation Act.

Liability after merger. - Although the liability of the merged corporation would be the liability of the new corporation under Subsection E, this section does not impose the liability of one of the old corporations upon the other old corporation. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2624 to 2638.

Liability of corporation for debts of predecessor, 15 A.L.R. 1112; 30 A.L.R. 558; 39 A.L.R. 143; 149 A.L.R. 787.

Power to require nonassenting creditors or bondholders to accept securities of, or shares in, new or reorganized corporation, 28 A.L.R. 1196; 88 A.L.R. 1238.

Merger of corporations as justification for termination of contract of employment, 34 A.L.R. 817; 47 A.L.R. 258; 59 A.L.R. 294.

Liability on stock subscription as affected by reorganization, consolidation, or merger of corporation, 45 A.L.R. 1031; 89 A.L.R. 770; 154 A.L.R. 427.

Changes in corporate organization as affecting status as trustee, administrator, or guardian, 61 A.L.R. 994; 131 A.L.R. 753.

Successor products liability: form of business organization of successor or predecessor as affecting successor liability, 32 A.L.R.4th 196.

Fidelity bond termination clause on taking over of insured by another business entity: Construction and effect, 44 A.L.R.4th 1195.

Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 A.L.R.4th 166.

### **§ 53-14-7. Merger, consolidation or exchange of shares between domestic and foreign corporations.**

A. One or more foreign corporations and one or more domestic corporations may be merged or consolidated or participate in an exchange, in the following manner, if the merger, consolidation or exchange is permitted by the laws of the state under which each foreign corporation is organized:

(1) each domestic corporation shall comply with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] with respect to the merger, consolidation or exchange, as the case may be, of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized; and

(2) if the surviving or new corporation in a merger or consolidation is to be governed by the laws of any state other than this state, it shall comply with the provisions of the Business Corporation Act with respect to foreign corporations if it is to transact business in this state, and in every case it shall file with the commission:

(a) an agreement that it may be served with process in this state in any proceeding for the enforcement of any obligation of any domestic corporation which is a party to the merger or consolidation and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation;

(b) an irrevocable appointment of the secretary of state as its agent to accept service of

process in any such proceeding; and

(c) an agreement that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of the Business Corporation Act with respect to the rights of dissenting shareholders.

B. The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this state. If the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise. At any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.

History: 1953 Comp., § 51-27-7, enacted by Laws 1967, ch. 81, § 74; 1983, ch. 304, § 58.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment inserted "or exchange" and "shares between" in the catchline, in the introductory language of Subsection A inserted "or participate in an exchange" and "or exchange," inserted "or exchange" in Paragraph (1) of Subsection A, substituted "in a merger or consolidation" for "as the case may be" in the introductory language of Paragraph (2) of Subsection A, and substituted "shall be" for "are" in Subparagraph (c) of Paragraph (2) of Subsection A.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 77 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Merger or consolidation as creating multi-state corporation for purposes of federal diversity jurisdiction, 27 A.L.R.2d 777. Standing of private party under § 16 of Clayton Act (15 U.S.C.S. § 26) to seek injunction to prevent merger or acquisition allegedly prohibited under § 7 of the act (15 U.S.C.S. § 18), 78 A.L.R. Fed. 159. 20 C.J.S. Corporations § 1897.

## **Article 15**

### **Business Corporations; Sale of Assets**

## **§ 53-15-1. Sale of assets in regular course of business and mortgage or pledge of assets.**

The sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation in the usual and regular course of its business and the mortgage or pledge of any or all property and assets of a corporation, whether or not in the usual and regular course of business, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as authorized by its board of directors, and in any such case no authorization or consent of the shareholders shall be required.

History: 1953 Comp., § 51-28-1, enacted by Laws 1967, ch. 81, § 75.

Compiler's notes. - This section is derived from Section 78 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2654 to 2679.

Constitutionality, construction, and effect of statutory or charter provisions relating to sale of all, or substantially all, of assets of corporation or division or distribution of proceeds, 79 A.L.R. 624.

Applicability of statutes regulating sale of assets or property as affected by purpose or character of corporation, 9 A.L.R.2d 1306.

Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders, 58 A.L.R.2d 784.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

19 C.J.S. Corporations § 1038.

## **§ 53-15-2. Sale of assets other than in regular course of business.**

A sale, lease, exchange or other disposition of all or substantially all the property and assets, with or without the good will, of a corporation, if not in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner:

A. the board of directors shall adopt a resolution recommending such sale, lease, exchange or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

B. written notice shall be given to each shareholder of record, whether or not entitled to

vote at the meeting, not less than twenty days before the meeting, in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for the giving of notice of meetings of shareholders and, whether the meeting is an annual or a special meeting, shall state that the purpose, or one of the purposes, is to consider the proposed sale, lease, exchange or other disposition;

C. at the meeting, the shareholders may authorize such sale, lease, exchange or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. The authorization shall require the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the authorization shall require the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote as a class thereon and of the total shares entitled to vote thereon; and

D. after the authorization by a vote of shareholders, the board of directors, nevertheless, in its discretion, may abandon such sale, lease, exchange or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

History: 1953 Comp., § 51-28-2, enacted by Laws 1967, ch. 81, § 76; 1983, ch. 304, § 59.

Cross-references. - As to applicability of lowered voting requirements to existing corporations, see 53-18-6.1 NMSA 1978.

The 1983 amendment substituted "a majority" for "two-thirds" in two places in the last sentence of Subsection C and added "and" at the end of Subsection C.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 79 of the ABA Model Business Corporation Act.

Scope of article. - In this jurisdiction the transfer of substantially all assets of a corporation not in the normal course of business is governed by the Business Corporation Act - sale of assets (53-15-1 to 53-15-4 NMSA 1978). Regents of N.M. College of Agric. & Mechanic Arts v. Academy of Aviation, Inc., 83 N.M. 86, 488 P.2d 343 (1971).

Transfer to one other than stranger to corporation. - For a transfer to one other than a stranger to the corporation to be valid the statutory requirements must be strictly complied with. Regents of N.M. College of Agric. & Mechanic Arts v. Academy of Aviation, Inc., 83 N.M. 86, 488 P.2d 343 (1971).

Failure to strictly comply does not invalidate where required shares consent. - A failure to adhere to statutory procedure will not invalidate a transaction with a stranger to a corporation where in fact the required two-thirds shares of the corporation entitled to vote have consented to the transaction. Regents of N.M. College of Agric. & Mechanic Arts v. Academy of Aviation, Inc., 83 N.M. 86, 488 P.2d 343 (1971).

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2654 to 2679.

Constitutionality, construction, and effect of statutory or charter provisions relating to sale of all, or substantially all, of assets of corporation or division or distribution of the proceeds, 79 A.L.R. 624.

Applicability of statutes regulating sale of assets or property as affected by purpose or character of corporation, 9 A.L.R.2d 1306.

Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders, 58 A.L.R.2d 784.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 A.L.R.4th 887.

"Golden parachute" defense to hostile corporate takeover, 66 A.L.R.4th 138.

Lockup option defense to hostile corporate takeover, 66 A.L.R.4th 180.

19 C.J.S. Corporations § 1038.

### **§ 53-15-3. Right of shareholders to dissent and obtain payment for shares.**

A. Any shareholder of a corporation may dissent from, and obtain payment for the shareholder's shares in the event of, any of the following corporate actions:

(1) any plan of merger or consolidation to which the corporation is a party, except as provided in Subsection C of this section;

(2) any sale or exchange of all or substantially all of the property and assets of the corporation not made in the usual and regular course of its business, including a sale in dissolution, but not including a sale pursuant to an order of a court having jurisdiction in the premises or a sale for cash on terms requiring that all or substantially all of the net proceeds of sale be distributed to the shareholders in accordance with their respective interests within one year after the date of sale;

(3) any plan of exchange to which the corporation is a party as the corporation the shares of which are to be acquired;

(4) any amendment of the articles of incorporation which materially and adversely affects the rights appurtenant to the shares of the dissenting shareholder in that it:

- (a) alters or abolishes a preferential right of such shares;
- (b) creates, alters or abolishes a right in respect of the redemption of such shares, including a provision respecting a sinking fund for the redemption or repurchase of such shares;
- (c) alters or abolishes an existing preemptive right of the holder of such shares to acquire shares or other securities; or
- (d) excludes or limits the right of the holder of such shares to vote on any matter, or to cumulate his votes, except as such right may be limited by dilution through the issuance of shares or other securities with similar voting rights; or
- (5) any other corporate action taken pursuant to a shareholder vote with respect to which the articles of incorporation, the bylaws or a resolution of the board of directors directs that dissenting shareholders shall have a right to obtain payment for their shares.

B.(1) A record holder of shares may assert dissenters' rights as to less than all of the shares registered in his name only if the holder dissents with respect to all the shares beneficially owned by any one person and discloses the name and address of the person or persons on whose behalf the holder dissents. In that event, his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders.

(2) A beneficial owner of shares who is not the record holder may assert dissenters' rights with respect to shares held on his behalf, and shall be treated as a dissenting shareholder under the terms of this section and Section 53-15-4 NMSA 1978 if he submits to the corporation at the time of or before the assertion of these rights a written consent of the record holder.

C. The right to obtain payment under this section shall not apply to the shareholders of the surviving corporation in a merger if a vote of the shareholders of such corporation is not necessary to authorize such merger.

D. A shareholder of a corporation who has a right under this section to obtain payment for his shares shall have no right at law or in equity to attack the validity of the corporate action that gives rise to his right to obtain payment, nor to have the action set aside or rescinded, except when the corporate action is unlawful or fraudulent with regard to the complaining shareholder or to the corporation.

History: 1953 Comp., § 51-28-3, enacted by Laws 1967, ch. 81, § 77; 1975, ch. 64, § 36; 1983, ch. 304, § 60.

The 1983 amendment added "and obtain payment for shares" at the end of the catchline, inserted "and obtain payment for the shareholder's shares in the event of" in the introductory language of Subsection A, inserted "except as provided in Subsection C of this section" in Paragraph (1) of Subsection A, added Paragraphs (3) to (5) of Subsection A, designated former Subsection B as present Paragraph (1) of Subsection B, rewrote the first sentence of Paragraph (1) of Subsection B, which formerly read: "A shareholder may dissent as to less than all of the shares registered in his name," added Paragraph (2) of Subsection B, substituted "The right to obtain payment under" for "The provisions of" at the beginning of Subsection C, and added Subsection D.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 80 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 836; 19 Am. Jur. 2d Corporations §§ 2574, 2582 to 2586.  
19 C.J.S. Corporations §§ 1612 to 1616.

#### **§ 53-15-4. Rights of dissenting shareholders.**

A. Any shareholder electing to exercise his right of dissent shall file with the corporation, prior to or at the meeting of shareholders at which the proposed corporate action is submitted to a vote, a written objection to the proposed corporate action. If the proposed corporate action is approved by the required vote and the shareholder has not voted in favor thereof, the shareholder may, within ten days after the date on which the vote was taken or if a corporation is to be merged without a vote of its shareholders into another corporation any of its shareholders may, within twenty-five days after the plan of the merger has been mailed to the shareholders, make written demand on the corporation, or, in the case of a merger or consolidation, on the surviving or new corporation, domestic or foreign, for payment of the fair value of the shareholder's shares, and, if the proposed corporate action is effected, the corporation shall pay to the shareholder, upon the determination of the fair value, by agreement or judgment as provided herein, and, in the case of shares represented by certificates, the surrender of such certificates the fair value thereof as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of the corporate action. Any shareholder failing to make demand within the

prescribed ten-day or twenty-five-day period shall be bound by the terms of the proposed corporate action. Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder.

B. No such demand may be withdrawn unless the corporation consents thereto. If, however, the demand is withdrawn upon consent, or if the proposed corporate action is abandoned or rescinded or the shareholders revoke the authority to effect the action, or if, in the case of a merger, on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporation, domestic and foreign, that are parties to the merger, or if no demand or petition for the determination of fair value by a court has been made or filed within the time provided in this section, or if a court of competent jurisdiction determines that the shareholder is not entitled to the relief provided by this section, then the right of the shareholder to be paid the fair value of his shares ceases and his status as a shareholder shall be restored, without prejudice, to any corporate proceedings which may have been taken during the interim.

C. Within ten days after such corporate action is effected, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, domestic or foreign, shall give written notice thereof to each dissenting shareholder who has made demand as provided in this section and shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by the corporation to be the fair value thereof. The notice and offer shall be accompanied by a balance sheet of the corporation, the shares of which the dissenting shareholder holds, as of the latest available date and not more than twelve months prior to the making of the offer, and a profit and loss statement of the corporation for the twelve-months' period ended on the date of the balance sheet.

D. If within thirty days after the date on which the corporate action was effected the fair value of the shares is agreed upon between any dissenting shareholder and the corporation, payment therefor shall be made within ninety days after the date on which the corporate action was effected, and, in the case of shares represented by certificates, upon surrender of the certificates. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in the shares.

E. If, within the period of thirty days, a dissenting shareholder and the corporation do not so agree, then the corporation, within thirty days after receipt of written demand from any dissenting shareholder, given within sixty days after the date on which corporate action was effected, shall, or at its election at any time within the period of sixty days may, file a petition in any court of competent jurisdiction in the county in this state where the registered office of the corporation is located praying that the fair value of the shares be found and determined. If, in the case of a merger or consolidation, the surviving or new corporation is a foreign corporation without a registered office in this state, the petition shall be filed in the county where the registered office of the domestic corporation was last located. If the corporation fails to institute the proceeding as

provided in this section, any dissenting shareholder may do so in the name of the corporation. All dissenting shareholders, wherever residing, shall be made parties to the proceeding as an action against their shares quasi in rem. A copy of the petition shall be served on each dissenting shareholder who is a resident of this state and shall be served by registered or certified mail on each dissenting shareholder who is a nonresident. Service on nonresidents shall also be made by publication as provided by law. The jurisdiction of the court shall be plenary and exclusive. All shareholders who are parties to the proceeding shall be entitled to judgment against the corporation for the amount of the fair value of their shares. The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as specified in the order of their appointment or on an amendment thereof. The judgment shall be payable to the holders of uncertificated shares immediately, but to the holders of shares represented by certificates only upon and concurrently with the surrender to the corporation of certificates. Upon payment of the judgment, the dissenting shareholder ceases to have any interest in the shares.

F. The judgment shall include 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 vote was taken on the proposed corporate action to the date of payment.

G. The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of the costs and expenses may be apportioned and assessed as the court deems equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation made an offer to pay for the shares if the court finds that the action of the shareholders in failing to accept the offer was arbitrary or vexatious or not in good faith. Such expenses include reasonable compensation for and reasonable expenses of the appraisers, but exclude the fees and expenses of counsel for and experts employed by any party; but if the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court determines to be reasonable compensation to any expert employed by the shareholder in the proceeding, together with reasonable fees of legal counsel.

H. Upon receiving a demand for payment from any dissenting shareholder, the corporation shall make an appropriate notation thereof in its shareholder records. Within twenty days after demanding payment for his shares, each holder of shares represented by certificates demanding payment shall submit the certificates to the corporation for notation thereon that such demand has been made. His failure to do so shall, at the option of the corporation, terminate his rights under this section unless a court of competent jurisdiction, for good and sufficient cause shown, otherwise directs. If uncertificated shares for which payment has been demanded or shares represented by a certificate on which notation has been so made is [are] transferred, any new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of the shares, and a transferee of the shares acquires by such transfer

no rights in the corporation other than those which the original dissenting shareholder had after making demand for payment of the fair value thereof.

I. Shares acquired by a corporation pursuant to payment of the agreed value therefor or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by the corporation as in the case of other treasury shares, except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

History: 1953 Comp., § 51-28-4, enacted by Laws 1967, ch. 81, § 78; 1983, ch. 304, § 61.

Cross-references. - For definition of "shares," see 53-11-2D NMSA 1978.

The 1983 amendment substituted "upon the determination . . . surrender of such certificates" for "upon surrender of the certificate or certificates representing the shares" near the end of the second sentence of Subsection A, substituted "corporation" for "corporations" preceding "domestic" near the middle of the last sentence of Subsection B, substituted "provided in this section" for "herein provided" near the middle of the first sentence of Subsection C, inserted "and, in the case of shares represented by certificates," near the end of the first sentence of Subsection D, substituted "certificates" for "certificate or certificates representing such shares" at the end of the first sentence of Subsection D, substituted "fails" for "shall fail" and substituted "provided in this section" for "herein provided" in the third sentence of Subsection E, deleted "shall be" preceding "specified" and inserted "on" preceding "an amendment" in the tenth sentence of Subsection E, inserted "to the holders of uncertificated shares immediately, but to the holders of shares represented by certificates" and substituted "certificates" for "the certificate or certificates representing such shares" in the eleventh sentence of Subsection E, substituted "ceases" for "shall cease" in the last sentence of Subsection E, substituted "deems" for "may deem" and "finds" for "shall find" in the first sentence of Subsection G, deleted "shall" preceding "exclude the fees," substituted "determines" for "may determine" and deleted "or experts" following "expert" in the second sentence of Subsection G, added the present first sentence of Subsection H, substituted "holder of shares represented by certificates" for "shareholder" and substituted "certificates" for "certificate or certificates representing his shares," and deleted "shall" preceding "otherwise directs" in the second sentence of Subsection H, and inserted "uncertificated" preceding "shares" and inserted "for which payment has been demanded or shares" following "shares" in the last sentence of Subsection H and made other minor changes.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 81 of the ABA Model Business Corporation Act.

Section does not specify how shares valued. - This section does not specify the method by which the court should determine fair value of shares of dissenting stockholders. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

Market value of stock is generally the base price at which a stock could be sold by a willing, informed seller to an informed, willing buyer. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

Elements of valuation. - In arriving at the fair value of the shares of dissenting stockholders, courts have been almost unanimous in using a combination of three elements of valuation: (1) net asset value; (2) market value, and (3) investment or earnings value. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

Use of appraisers. - The appraiser has discretion in determining market, asset and investment value of shares of dissenting stockholders, but the appraiser's valuation is then subject to review by the trial court to determine whether it is supported upon reasonable grounds and if the appraiser's valuation is not so supported, the trial court may substitute its own calculation of any or all of the factors. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

Award of interest. - The statute places the awarding of interest within the discretion of the court, and the court did not abuse its discretion by awarding 6% interest because such conclusion is supported by substantial evidence. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

When attorney's and expert's fees awarded. - Under this section, once the court determines that the fair value materially exceeds the amount which the corporation has offered for the shares, it may, in its discretion, award what it may determine to be reasonable compensation by way of expert fees and attorney's fees, but it may not award only expert fees and not attorney's fees if the shareholder has employed both an expert and an attorney in the proceeding. Tome Land & Imp. Co. v. Silva, 83 N.M. 549, 494 P.2d 962 (1972).

Fee contract evidence of reasonable attorney's fee. - A contingent fee contract between dissenting shareholders and their attorney is properly admissible so long as its effect is limited to being simply an item of evidence having some probative value in resolving the issue of the amount of a reasonable attorney's fee to be allowed dissenters, to be weighed and taken into account with all of the other evidence bearing on that question. Tome Land & Imp. Co. v. Silva, 86 N.M. 87, 519 P.2d 1024 (1973).

Fee awarded to dissenting shareholders. - Subsection G of this section provides not only that the amount of the fee is to be reasonable, but that it is to be awarded to the dissenting shareholders, not to their attorney. Therefore defendant is not entitled to credit for amounts paid or to be paid by dissenting shareholders to their attorney under

contingent fee contract. *Tome Land & Imp. Co. v. Silva*, 86 N.M. 87, 519 P.2d 1024 (1973).

No jurisdiction over fee paid to dissenters' attorney. - The trial court is without jurisdiction to fix the amount to be paid by dissenters to their attorney under contingent fee contract or pass upon the reasonableness of such amounts. Amount could be more than, the same as or less than the amount found by the court to be reasonable under the statute. *Tome Land & Imp. Co. v. Silva*, 86 N.M. 87, 519 P.2d 1024 (1973).

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations § 836; 19 Am. Jur. 2d Corporations §§ 2574, 2582 to 2586.

Statute for protection of dissenting shareholder upon change of corporate structure affecting his preferential rights, 78 A.L.R. 1118.

Dissenting stockholders, construction and effect of provisions for payment of, in statutes relating to merger or consolidation of corporations, 87 A.L.R. 597; 162 A.L.R. 1237; 174 A.L.R. 960.

Status of owners of nonregistered stock as "stockholders" within state statute relating to merger or consolidation or reorganization of corporation, or sale of its entire assets, 158 A.L.R. 983.

Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders, 58 A.L.R.2d 784.

Timeliness and sufficiency of dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 A.L.R.3d 260.

Valuation of stock of dissenting stockholders in case of sale of corporate assets, 48 A.L.R.3d 430.

19 C.J.S. Corporations §§ 1612 to 1616.

## **Article 16**

### **Business Corporations; Dissolution of Corporations**

#### **§ 53-16-1. Voluntary dissolution by incorporators.**

A corporation which has not commenced business and which has not issued any shares may be voluntarily dissolved by its incorporators at any time, in the following manner:

A. articles of dissolution shall be executed in duplicate by a majority of the incorporators, and verified by them, and shall set forth:

(1) the name of the corporation;

(2) the date of issuance of its certificates of incorporation;

- (3) that none of its shares has been issued;
- (4) that the corporation has not commenced business;
- (5) that the amount, if any, actually paid in on subscriptions for its shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto;
- (6) that no debts of the corporation remain unpaid; and
- (7) that a majority of the incorporators elect that the corporation be dissolved;

B. duplicate originals of the articles of dissolution shall be delivered to the commission. If the commission finds that the articles of dissolution conform to law and that the corporation has complied with the Tax Administration Act [Chapter 7, Article 1 NMSA 1978], and has paid all contributions required by the Unemployment Compensation Law [Chapter 51 NMSA 1978], it shall, when all fees and franchise taxes have been paid:

- (1) endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing;
- (2) file one of the duplicate originals in its office; and
- (3) issue a certificate of dissolution to which it shall affix the other duplicate original;

C. the certificate of dissolution, together with the duplicate original of the articles of dissolution affixed thereto by the commission, shall be returned to the incorporators or their representative. Upon the issuance of the certificate of dissolution by the commission, the existence of the corporation shall cease.

History: 1953 Comp., § 51-29-1, enacted by Laws 1967, ch. 81, § 79; 1975, ch. 64, § 37.

Compiler's notes. - This section is derived from Section 82 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2733 to 2736, 2740, 2741, 2746.  
19 C.J.S. Corporations §§ 1638, 1639.

## **§ 53-16-2. Voluntary dissolution by consent of shareholders.**

A corporation may be voluntarily dissolved by the written consent of all of its shareholders. Upon the execution of such written consent, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one of the officers signing the statement, which statement shall set forth:

- A. the name of the corporation;
- B. the names and respective addresses of its officers;
- C. the names and respective addresses of its directors;
- D. a copy of the written consent signed by all shareholders of the corporation; and
- E. a statement that such written consent has been signed by all shareholders of the corporation or signed in their names by their attorneys in fact thereunto duly authorized.

History: 1953 Comp., § 51-29-2, enacted by Laws 1967, ch. 81, § 80.

Compiler's notes. - This section is derived from Section 83 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2736, 2748, 2750 to 2753, 2786.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 A.L.R.4th 13.

19 C.J.S. Corporations §§ 1641, 1642, 1684, 1685.

## **§ 53-16-3. Voluntary dissolution by act of corporation.**

A corporation may be dissolved by the act of the corporation, when authorized in the following manner:

A. the board of directors shall adopt a resolution recommending that the corporation be dissolved and directing that the question of dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

B. written notice shall be given to each shareholder of record entitled to vote at the meeting within the time and in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for the giving of notice of meetings of shareholders and, whether the meeting is an annual or special meeting, shall state that the purpose, or one of the purposes, of the meeting is to consider the advisability of dissolving the

corporation;

C. at the meeting, a vote of shareholders entitled to vote shall be taken on a resolution to dissolve the corporation. The resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon; and

D. upon the adoption of the resolution, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary and verified by one of the officers signing the statement, which statement shall set forth:

(1) the name of the corporation;

(2) the names and respective addresses of its officers;

(3) the names and respective addresses of its directors;

(4) a copy of the resolution adopted by the shareholders authorizing the dissolution of the corporation;

(5) the number of shares outstanding and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class; and

(6) the number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class [voted] for and against the resolution, respectively.

History: 1953 Comp., § 51-29-3, enacted by Laws 1967, ch. 81, § 81; 1983, ch. 304, § 62.

Cross-references. - As to applicability of lowered voting requirements to existing corporations, see 53-18-6.1 NMSA 1978.

The 1983 amendment deleted "thereat" preceding "shall be taken" in the first sentence of Subsection C and substituted "a majority" for "two-thirds" in two places in the last sentence of Subsection C, and added "and" at the end of Subsection C.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 84 of the ABA Model Business Corporation Act.

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2736, 2748, 2751, 2754 to 2756.

Dissolution of corporation on grounds of intracorporate deadlock or dissension, 83 A.L.R.3d 458.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 A.L.R.4th 13.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution, 72 A.L.R.4th 419.

19 C.J.S. Corporations §§ 1645, 1683.

#### **§ 53-16-4. Filing statement of intent to dissolve.**

Duplicate originals of the statement of intent to dissolve, whether by consent of shareholders or by act of the corporation, shall be delivered to the commission. If the commission finds that the statement conforms to law, it shall:

A. endorse on each of the duplicate originals the word "filed" and the month, day and year of the filing;

B. file one of the duplicate originals in its office; and

C. return the other duplicate original to the corporation or its representative.

History: 1953 Comp., § 51-29-4, enacted by Laws 1967, ch. 81, § 82; 1983, ch. 31, § 1.

The 1983 amendment deleted "when all fees and franchise taxes have been paid" at the end of the second sentence in the introductory language.

Effective dates. - Laws 1983, ch. 31, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 85 of the ABA Model Business Corporation Act.

#### **§ 53-16-5. Effect of statement of intent to dissolve.**

Upon the filing by the commission of a statement of intent to dissolve, whether by

consent of shareholders or by act of the corporation, the corporation shall cease to carry on its business, except insofar as necessary for the winding up thereof, but its corporate existence shall continue until a certificate of dissolution has been issued by the commission or until a decree dissolving the corporation has been entered by a court of competent jurisdiction as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-29-5, enacted by Laws 1967, ch. 81, § 83.

Compiler's notes. - This section is derived from Section 86 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2834, 2880 to 2883.

Conduct of affairs of corporation after its dissolution or expiration or forfeiture of its charter, 47 A.L.R. 1288; 97 A.L.R. 477.

Stockholders' rights to patent, copyright, or trademark owned by corporation on dissolution thereof, 30 A.L.R.2d 938.

Maintainability of criminal proceedings against dissolved corporation, 40 A.L.R.2d 1396.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

Availability of and time for bringing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 A.L.R.4th 414.

19 C.J.S. Corporations §§ 1727, 1728.

### **§ 53-16-6. Procedure after filing of statement of intent to dissolve.**

After the filing by the commission of a statement of intent to dissolve, the corporation:

A. shall immediately cause notice thereof to be mailed to each known creditor of the corporation;

B. shall proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests; and

C. at any time during the liquidation of its business and affairs, may make application to a court of competent jurisdiction within the county in which the registered office or principal place of business of the corporation is situated, to have the liquidation continued under the supervision of the court as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-29-6, enacted by Laws 1967, ch. 81, § 84.

Compiler's notes. - This section is derived from Section 87 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations §§ 1684 to 1692.

### **§ 53-16-7. Revocation of voluntary dissolution proceedings by consent of shareholders.**

By the written consent of all of its shareholders, a corporation may, at any time prior to the issuance of a certificate of dissolution by the commission, revoke voluntary dissolution proceedings theretofore taken, in the following manner. Upon the execution of such written consent, a statement of revocation of voluntary dissolution proceedings shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one of the officers signing the statement, which statement shall set forth:

- A. the name of the corporation;
- B. the names and respective addresses of its officers;
- C. the names and respective addresses of its directors;
- D. a copy of the written consent signed by all shareholders of the corporation revoking the voluntary dissolution proceedings; and
- E. that the written consent has been signed by all shareholders of the corporation or signed in their names by their attorneys thereunto duly authorized.

History: 1953 Comp., § 51-29-7, enacted by Laws 1967, ch. 81, § 85.

Compiler's notes. - This section is derived from Section 88 of the ABA Model Business Corporation Act.

### **§ 53-16-8. Revocation of voluntary dissolution proceedings by act of corporation.**

By the act of the corporation, a corporation may, at any time prior to the issuance of a certificate of dissolution by the commission, revoke voluntary dissolution proceedings theretofore taken, in the following manner:

- A. the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked and directing that the question of revocation be

submitted to a vote at a special meeting of shareholders;

B. written notice stating that the purpose or one of the purposes of the meeting is to consider the advisability of revoking the voluntary dissolution proceedings shall be given to each shareholder of record entitled to vote at the meeting within the time and in the manner provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] for the giving of notice of special meetings of shareholders;

C. at the meeting, a vote of the shareholders entitled to vote shall be taken on a resolution to revoke the voluntary dissolution proceedings, which shall require for its adoption the affirmative vote of the holders of a majority of the shares entitled to vote thereon; and

D. upon the adoption of the resolution, a statement of revocation of voluntary dissolution proceedings shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary and verified by one of the officers signing the statement, which statement shall set forth:

(1) the name of the corporation;

(2) the names and respective addresses of its officers;

(3) the names and respective addresses of its directors;

(4) a copy of the resolution adopted by the shareholders revoking the voluntary dissolution proceedings;

(5) the number of shares outstanding; and

(6) the number of shares voted for and against the resolution, respectively.

History: 1953 Comp., § 51-29-8, enacted by Laws 1967, ch. 81, § 86; 1983, ch. 304, § 63.

Cross-references. - As to applicability of lowered voting requirements to existing corporations, see 53-18-6.1 NMSA 1978.

The 1983 amendment deleted "thereat" preceding "shall be taken," and substituted "a majority" for "two-thirds" in Subsection C and added "and" at the end of that subsection.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 89 of the ABA Model Business Corporation Act.

### **§ 53-16-9. Filing statement of revocation of voluntary dissolution proceedings.**

Duplicate originals of the statement of revocation of voluntary dissolution proceedings, whether by consent of shareholders or by act of the corporation, shall be delivered to the commission. If the commission finds that the statement conforms to law, it shall, when all fees and franchise taxes have been paid:

- A. endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing;
- B. file one of the duplicate originals in its office; and
- C. return the other duplicate original to the corporation or its representative.

History: 1953 Comp., § 51-29-9, enacted by Laws 1967, ch. 81, § 87.

Compiler's notes. - This section is derived from Section 90 of the ABA Model Business Corporation Act.

### **§ 53-16-10. Effect of statement of revocation of voluntary dissolution proceedings.**

Upon the filing by the commission of a statement of revocation of voluntary dissolution proceedings, whether by consent of shareholders or by act of the corporation, the revocation of the voluntary dissolution proceedings shall become effective and the corporation may again carry on its business.

History: 1953 Comp., § 51-29-10, enacted by Laws 1967, ch. 81, § 88.

Compiler's notes. - This section is derived from Section 91 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Reinstatement of repealed, forfeited, expired, or suspended corporate charter as validating interim acts of corporation, 42 A.L.R.4th 392.

### **§ 53-16-11. Articles of dissolution.**

If voluntary dissolution proceedings have not been revoked, then, when all debts, liabilities and obligations of the corporation have been paid and discharged, or adequate provision has been made therefor, and all of the remaining property and assets of the

corporation have been distributed to its shareholders, articles of dissolution shall be executed in duplicate by the corporation by its president or a vice president and by its secretary or an assistant secretary, and verified by one of the officers signing the statement, which statement shall set forth:

A. the name of the corporation;

B. that the commission has theretofore filed a statement of intent to dissolve the corporation, and the date on which the statement was filed;

C. that all debts, obligations and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor;

D. that all the remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests; and

E. that there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgement, order or decree which may be entered against it in any pending suit.

History: 1953 Comp., § 51-29-11, enacted by Laws 1967, ch. 81, § 89.

Compiler's notes. - This section is derived from Section 92 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations § 1692.

### **§ 53-16-12. Filing of articles of dissolution.**

A. Duplicate originals of articles of dissolution shall be delivered to the commission. If the commission finds that the articles of dissolution conform to law, and that the corporation has complied with the Tax Administration Act [Chapter 7, Article 1 NMSA 1978], and has paid all contributions required by the Unemployment Compensation Law [Chapter 51 NMSA 1978], it shall, when all fees and franchise taxes have been paid:

(1) endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing;

(2) file one of the duplicate originals in its office; and

(3) issue a certificate of dissolution to which it shall affix the other duplicate original.

B. The certificate of dissolution, together with the duplicate original of the articles of dissolution affixed thereto by the commission, shall be returned to the representative of the dissolved corporation. Upon the issuance of the certificate of dissolution, the

existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by shareholders, directors and officers as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-29-12, enacted by Laws 1967, ch. 81, § 90.

Compiler's notes. - This section is derived from Section 93 of the ABA Model Business Corporation Act.

### **§ 53-16-13. Involuntary dissolution.**

A corporation may be dissolved involuntarily by a decree of the district court of Santa Fe county in an action filed by the attorney general when it is established that the corporation:

- A. procured its articles of incorporation through fraud; or
- B. has continued to exceed or abuse the authority conferred upon it by law.

History: 1953 Comp., § 51-29-13, enacted by Laws 1967, ch. 81, § 91.

Compiler's notes. - This section is derived from Section 94 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2788 to 2827, 2879.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 A.L.R.4th 13.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution, 72 A.L.R.4th 419.

19 C.J.S. Corporations §§ 1647 to 1673, 1694 to 1726.

### **§ 53-16-14. Notification to attorney general.**

The commission shall certify to the attorney general, from time to time, the names of all corporations which have given cause for dissolution as provided by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], together with the facts pertinent thereto. Whenever the commission certifies the name of a corporation to the attorney general as having given cause for dissolution, the commission shall concurrently mail to the corporation at its registered office a notice that the certification has been made. Upon the receipt of the certification, the attorney general shall file an action in the name of the state against the corporation for its dissolution.

History: 1953 Comp., § 51-29-14, enacted by Laws 1967, ch. 81, § 92.

Compiler's notes. - This section is derived from Section 95 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2817, 2819.  
19 C.J.S. Corporations §§ 1695, 1699.

### **§ 53-16-15. Venue and process.**

Every action for the involuntary dissolution of a corporation shall be commenced by the attorney general in the district court of Santa Fe county. Summons shall issue and be served as in other civil actions. If process is returned not found, the attorney general shall cause publication to be made as in other civil cases in some newspaper published in the county where the registered office of the corporation is situated, containing a notice of the pendency of the action, the title of the court, the title of the action and the date on or after which default may be entered. The attorney general may include in one notice the names of any number of corporations against which actions are then pending in the same court. The attorney general shall cause a copy of the notice to be mailed to the corporation at its registered office within ten days after the first publication thereof. The certificate of the attorney general of the mailing of the notice is prima facie evidence thereof. The notice shall be published at least once each week for two successive weeks, and the first publication thereof may begin at any time after the summons has been returned. Unless a corporation has been served with summons, no default shall be taken against it earlier than thirty days after the first publication of the notice.

History: 1953 Comp., § 51-29-15, enacted by Laws 1967, ch. 81, § 93.

Compiler's notes. - This section is derived from Section 96 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations § 1697.

### **§ 53-16-16. Jurisdiction of court to liquidate assets and business of corporation.**

A. The district courts may liquidate the assets and business of a corporation:

(1) in an action by a shareholder when it is established that:

(a) the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

(b) the acts of the directors or those in control of the corporation are illegal, oppressive

or fraudulent; or

(c) the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(d) the corporate assets are being misapplied or wasted;

(2) in an action by a creditor:

(a) when the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied and it is established that the corporation is insolvent; or

(b) when the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent;

(3) upon application by a corporation which has filed a statement of intent to dissolve, as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], to have its liquidation continued under the supervision of the court; or

(4) when an action has been filed by the attorney general to dissolve a corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

B. Proceedings under Subsections A(1), A(2) or A(3) of this section shall be brought in the county in which the registered office or the principal office of the corporation is situated.

C. It is not necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally.

History: 1953 Comp., § 51-29-16, enacted by Laws 1967, ch. 81, § 94.

Compiler's notes. - This section is derived from Section 97 of the ABA Model Business Corporation Act.

This section does not provide that disagreement warrants liquidation. *Dilaconi v. New Cal Corp.*, 97 N.M. 782, 643 P.2d 1234 (Ct. App. 1982).

Action to liquidate or dissolve. - A derivative action is authorized by this section and the court is authorized to discontinue the liquidation or to dissolve the corporation under 53-16-20 and 53-16-21 NMSA 1978 as is necessary to do justice to all involved. *Prager v. Prager*, 80 N.M. 773, 461 P.2d 906 (1969).

Recognition of remedies not listed in section. - The court of appeals approved the trial court's recognition of remedies not specifically stated in this section, since an order of corporate dissolution is a drastic remedy and should be utilized sparingly, after consideration of other alternative forms of relief. *McCauley v. Tom McCauley & Son*, 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

Substantial evidence to support finding of oppressive conduct. - See *McCauley v. Tom McCauley & Son*, 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

Individual without shares cannot do business as corporation. - An individual, who owns no shares of a corporation, cannot be "doing business as" the corporation, and this same individual, by merely using the term "dba" cannot place the corporation in bankruptcy. *Great W. Constr. Co. v. N.C. Ribble Co.*, 77 N.M. 725, 427 P.2d 246 (1967).

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations §§ 1647, 1648.

## **§ 53-16-17. Procedure in liquidation of corporation by court.**

A. In proceedings to liquidate the assets and business of a corporation, the court may issue injunctions, appoint a receiver or receivers *pendente lite*, with such powers and duties as the court, from time to time, may direct, and take other proceedings necessary to preserve the corporate assets wherever situated, and carry on the business of the corporation until a full hearing can be had.

B. After a hearing upon notice as the court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation, including all amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares. The liquidating receiver or receivers may, subject to the order of the court, sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied to the expenses of the liquidation and then to the payment of reasonable wages to employees of the corporation for work done within four months of the liquidation proceedings, and then to the payment of the liabilities and obligations of the corporation, and any remaining assets or proceeds shall be distributed among its shareholders according to their respective rights and interests. The order appointing the liquidating receiver or receivers shall state their powers and duties. The powers and duties may be increased or

diminished at any time during the proceedings.

C. The court may allow, from time to time, as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceeding, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of the assets.

D. A receiver of a corporation appointed under the provisions of this section may sue and defend in all courts in his own name as receiver of the corporation. The court appointing the receiver has exclusive jurisdiction of the corporation and its property, wherever situated.

History: 1953 Comp., § 51-29-17, enacted by Laws 1967, ch. 81, § 95; 1975, ch. 64, § 38.

Compiler's notes. - This section is derived from Section 98 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2847 to 2861.

Director's power to sell property of insolvent corporation without consent of stockholders, 5 A.L.R. 932; 60 A.L.R. 1210.

Right of corporation to preferred creditors, 19 A.L.R. 320; 38 A.L.R. 90; 48 A.L.R. 479; 56 A.L.R. 207; 62 A.L.R. 738.

Validity as against creditors of obligation given by corporation for officer's or stockholder's personal debt, 47 A.L.R. 78.

Dissolution of corporation or expiration or forfeiture of its charter as affecting power to sue, 47 A.L.R. 1380; 97 A.L.R. 477.

Right of holders of preferred stock to have receiver appointed, 50 A.L.R. 261.

Dividends, duty and remedy as regards deferring payments of, while there are undetermined claims or preferences, 88 A.L.R. 1301.

Disposition of rights of missing stockholders in corporation, 101 A.L.R. 670.

Appointment of receiver after dissolution or expiration of charter of corporation, 109 A.L.R. 1526.

Right of creditors or their representatives to complain of voluntary transfer or pledge of corporate assets by corporation which subsequently becomes insolvent, 117 A.L.R. 1263.

Preference over other creditors based on claim for insurance premiums advanced on policies issued insured, 8 A.L.R.2d 349.

Validity of security for contemporaneous loan to insolvent corporation by officer or director, 31 A.L.R.2d 670.

19 C.J.S. Corporations §§ 1748 to 1771.

## **§ 53-16-18. Qualifications of receivers.**

A receiver shall in all cases be a natural person or a corporation authorized to act as receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in this state, and shall in all cases give bond as the court may direct with sureties as the court may require.

History: 1953 Comp., § 51-29-18, enacted by Laws 1967, ch. 81, § 96; 1975, ch. 64, § 39.

Compiler's notes. - This section is derived from Section 99 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 C.J.S. Corporations § 1749.

## **§ 53-16-19. Filing of claims in liquidation proceedings.**

In proceedings to liquidate the assets and business of a corporation, the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall be not less than four months from the date of the order, as the last day for the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the corporation.

History: 1953 Comp., § 51-29-19, enacted by Laws 1967, ch. 81, § 97.

Compiler's notes. - This section is derived from Section 100 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2862, 2863.

19 C.J.S. Corporations §§ 1763 to 1766.

## **§ 53-16-20. Discontinuance of liquidation proceedings.**

The liquidation of the assets and business of a corporation may be discontinued at any

time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event, the court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

History: 1953 Comp., § 51-29-20, enacted by Laws 1967, ch. 81, § 98.

Compiler's notes. - This section is derived from Section 101 of the ABA Model Business Corporation Act.

Action to liquidate or dissolve. - A derivative action is authorized by 53-16-16 NMSA 1978 and the court is authorized to discontinue the liquidation or to dissolve the corporation under 53-16-21 NMSA 1978 and this section as is necessary to do justice to all involved. *Prager v. Prager*, 80 N.M. 773, 461 P.2d 906 (1969).

### **§ 53-16-21. Decree of involuntary dissolution.**

In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of the proceedings and all debts, obligations and liabilities of the corporation have been paid and discharged and all of its remaining property and assets distributed to its shareholders, or in case its property and assets are not sufficient to satisfy and discharge the costs, expenses, debts and obligations, all the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease.

History: 1953 Comp., § 51-29-21, enacted by Laws 1967, ch. 81, § 99.

Compiler's notes. - This section is derived from Section 102 of the ABA Model Business Corporation Act.

Action to liquidate or dissolve. - A derivative action is authorized by 53-16-16 NMSA 1978 and the court is authorized to discontinue the liquidation or to dissolve the corporation under 53-16-20 NMSA 1978 and this section as is necessary to do justice to all involved. *Prager v. Prager*, 80 N.M. 773, 461 P.2d 906 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2827, 2879.

19 C.J.S. Corporations §§ 1703, 1716, 1725.

### **§ 53-16-22. Filing of decree of dissolution.**

In case the court enters a decree dissolving a corporation, the clerk of the court shall cause a certified copy of the decree to be filed with the commission. No fee shall be charged by the commission for the filing.

History: 1953 Comp., § 51-29-22, enacted by Laws 1967, ch. 81, § 100.

Compiler's notes. - This section is derived from Section 103 of the ABA Model Business Corporation Act.

### **§ 53-16-23. Deposit with state treasurer of amount due certain shareholders.**

Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and there is no person legally competent to receive the distributive portion, shall be reduced to cash and deposited with the state treasurer and shall be paid over to the creditor or shareholder or to his legal representative upon proof satisfactory to the state treasurer of his right thereto.

History: 1953 Comp., § 51-29-23, enacted by Laws 1967, ch. 81, § 101.

Compiler's notes. - This section is derived from Section 105 of the ABA Model Business Corporation Act.

### **§ 53-16-24. Survival of remedy after dissolution.**

The dissolution of a corporation does not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to the dissolution and any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers may take such corporate or other action as appropriate to protect the remedy, right or claim.

History: 1953 Comp., § 51-29-24, enacted by Laws 1967, ch. 81, § 102.

Compiler's notes. - This section is derived from Section 104 of the ABA Model Business Corporation Act.

Where corporate lessor covenanted to repay lessee for improvements on leased premises if lessee vacated premises, and lessor conveyed premises to stockholders who owned all but one share of stock, there was sufficient privity between parties to contract for repayment of improvements to bind stockholders and make them liable for repayment when lessee vacated premises. *Heyde v. State Sec., Inc.*, 63 N.M. 395, 320 P.2d 747 (1958) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations §§ 2838 to 2846.

Availability of and time for bringing action against former director, officer, or stockholder

in dissolved corporation for personal injuries incurred after final dissolution, 20 A.L.R.4th 414.

19 C.J.S. Corporations §§ 1772 to 1780.

## **Article 17**

### **Business Corporations; Foreign Corporations**

#### **§ 53-17-1. Admission of foreign corporation.**

No foreign corporation shall transact business in this state until it has procured a certificate of authority to do so from the commission. No foreign corporation shall procure a certificate of authority under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] to transact in this state any business which a corporation organized under the Business Corporation Act is not permitted to transact. A foreign corporation shall not be denied a certificate of authority because the laws of the state or country under which the corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in the Business Corporation Act authorizes this state to regulate the organization or the internal affairs of such corporation. Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of the Business Corporation Act, by reason of carrying on in this state any one or more of the following activities:

A. maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

B. holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

C. maintaining bank accounts;

D. maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;

E. effecting sales through independent contractors;

F. soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance without this state before becoming binding contracts;

G. creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interest in real or personal property;

H. securing or collecting debts or enforcing any rights in property securing them;

I. transacting any business in interstate commerce;

J. conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature; or

K. investing in or acquiring, in transactions outside New Mexico, royalties and other nonoperating mineral interests and the execution of division orders, contracts of sale and other instruments incidental to the ownership of the nonoperating mineral interests.

History: 1953 Comp., § 51-30-1, enacted by Laws 1967, ch. 81, § 103; 1969, ch. 48, § 1; 1975, ch. 64, § 40.

Emergency clauses. - Laws 1969, ch. 48, § 2, makes the act effective immediately. Approved March 19, 1969.

Compiler's notes. - This section is derived from Section 106 of the ABA Model Business Corporation Act.

Requirements for resort to state courts. - These provisions establish requirements for corporations should they desire to resort to the courts of this state in seeking remedies while the long arm statute submits a corporation to the jurisdiction of the courts through its acts, regardless of the corporation's intention to use the courts. *Winward v. Holly Creek Mills, Inc.*, 83 N.M. 469, 493 P.2d 954 (1972).

Jurisdictional test not created by provisions as to soliciting orders. - The statutory language of this section dealing with the solicitation of orders as not constituting transaction of business within New Mexico, is for purposes of the Business Corporation Act, and not for testing jurisdiction under 38-1-16 NMSA 1978. *Winward v. Holly Creek Mills, Inc.*, 83 N.M. 469, 493 P.2d 954 (1972).

Engineering consulting services constitute "transacting business". - A company that provides consulting services in the field of engineering in order to promote a demand for manufacturers' products among potential customers, and that provides extensive engineering services for clients and customers alike in New Mexico, is transacting business within the ambit of this section and therefore is barred under 53-17-20 NMSA 1978 from maintaining any action, suit or proceeding in any court of this state. *Applied Technologies Assocs. v. Schmidt*, 362 F. Supp. 1103 (D.N.M. 1973).

Acts not constituting transaction of business in state. - Where nonauthorized foreign corporation was directly responsible to the insurance companies it represented for business produced and premiums collected by the local agent, who, in turn, became directly responsible to foreign corporation for the remittance of premium monies due, the debtor-creditor relationship created arose out of the agency relationship between the local agent and the insurers and is but incidental to the transaction of their insurance

business in New Mexico. It did not arise out of the transaction of business in New Mexico by foreign corporation in its own corporate capacity. *J.H. Silversmith, Inc. v. Keeter*, 72 N.M. 246, 382 P.2d 720 (1963) (decided under former law).

Where foreign corporation does not maintain an office in New Mexico, nor solicit business for itself as a general agency independent of the companies licensed to do business here for which it acts nor make separate contracts with local agents on its own behalf, it is not said to be transacting business in New Mexico. *J.H. Silversmith, Inc. v. Keeter*, 72 N.M. 246, 382 P.2d 720 (1963) (decided under former law).

The appointment and removal of local agents or the collection of premiums for insurance written on behalf of licensed insurance companies by a nonresident insurance agency corporation does not constitute the "transaction of business" by that agency. *J.H. Silversmith, Inc. v. Keeter*, 72 N.M. 246, 382 P.2d 720 (1963) (decided under former law).

Texas company's representative in New Mexico who only solicits offers for contracts which are relayed back to Texas for acceptance is not doing business in New Mexico and is not barred from suing in New Mexico on contract by statute which requires certain types of businesses doing business in New Mexico to obtain a certificate of authorization to transact business in New Mexico. *Don J. Cummings Co. v. Aluminum Mfg. Corp.* 371 F.2d 118 (10th Cir. 1967) (decided under former law).

Where court construes previous decisions to hold that mere solicitation of a contract in this state by an agent, to be accepted at a home office in a foreign state, amounts to the transaction of business and that any action thereon is barred, the court errs. *Vernon Co. v. Reed*, 78 N.M. 554, 434 P.2d 376 (1967) (decided under former law).

Where plaintiff's only business is financing the purchase of its airplanes to aid sales by its parent corporation and toward this end it creates liens on personal property in New Mexico and its other activities are incidental to and directly related to this permitted activity, such activities do not constitute transacting business within this state. *Cessna Fin. Corp. v. Mesilla Valley Flying Serv., Inc.*, 81 N.M. 10, 462 P.2d 144 (1969), cert. denied, 397 U.S. 1076, 90 S. Ct. 1521, 25 L. Ed. 2d 811 (1970) (decided under former law).

Single act not within statute. - If the making and delivery of the promissory note in New Mexico could be said to constitute transacting business here, it is but a single act of business which this court has held would not bring a foreign corporation within its qualifying statutes. *J.H. Silversmith, Inc. v. Keeter*, 72 N.M. 246, 382 P.2d 720 (1963) (decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 *Nat. Resources J.* 303 (1961).

For note, "The Entry and Regulation of Foreign Corporations Under New Mexico Law

and Under the Model Business Corporation Act," see 6 Nat. Resources J. 617 (1966).

For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 193 to 268, 316, 317.

Right of resident creditors of foreign corporation to preference over nonresident creditors, 1 A.L.R. 648.

Mode of proving authority of foreign corporation to do business within state, 2 A.L.R. 1235.

Agreement by foreign corporation to install article within the state as bringing transaction within state control, 11 A.L.R. 614; 101 A.L.R. 356.

Effect of domestication of foreign corporations, 18 A.L.R. 130; 126 A.L.R. 1503.

Soliciting subscriptions to or selling corporate stock as doing business within state, 35 A.L.R. 625.

Construction work as doing business within the state, 55 A.L.R. 726.

Soliciting within state of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 60 A.L.R. 994; 101 A.L.R. 126; 146 A.L.R. 941.

Status, citizenship, domicile, residence, or location of national corporations, 69 A.L.R. 1346; 88 A.L.R. 873.

Power of state to require foreign corporation to become incorporated under its laws as a condition of doing business in state, 72 A.L.R. 105.

Effect of agreement by foreign corporation to service or repair article sold or leased by it to bring transaction within state control, 126 A.L.R. 1104.

Power to regulate activities of foreign corporation within state as condition of its doing business within, 132 A.L.R. 482.

What constitutes doing business within state by foreign insurance corporation, 137 A.L.R. 1128.

Ownership or control by foreign corporation of stock of other corporation as constituting doing business within state, 18 A.L.R.2d 187.

What constitutes doing business within state by foreign magazine, newspaper, or other publishing corporations, for purposes other than taxation, 38 A.L.R.2d 747.

Collection or commercial agency as doing business within the state so as to be subject to statutory regulation and licensing provisions, 54 A.L.R.2d 885.

Leasing of real estate by foreign corporation, as lessor or lessee, as doing business within state within statute prescribing conditions of right to do business, 59 A.L.R.2d

1131.

Holding directors', officers', or stockholders' or sales meetings or conventions in a state by foreign corporation as doing business within the state, 84 A.L.R.2d 412.

Foreign corporation's leasing of personal property as doing business within statutes prescribing conditions of right to do business, 50 A.L.R.3d 1020.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

Construction work by foreign corporation as doing business for purposes of statute requiring foreign corporation to qualify as condition of access to local courts, 90 A.L.R.3d 929.

Personal liability of stockholder, officer, or agent for debt of foreign corporation doing business in state, 27 A.L.R.4th 387.

Construction, application, and operation of state "retaliatory" statutes imposing special taxes or fees on foreign insurers doing business in state, 30 A.L.R.4th 873.

20 C.J.S. Corporations §§ 1801 to 1842.

### **§ 53-17-2. Powers of foreign corporation.**

A foreign corporation which has received a certificate of authority under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] shall, until a certificate of revocation or of withdrawal, has been issued as provided in the Business Corporation Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which the certificate of authority is issued; and, except as otherwise provided in the Business Corporation Act, is subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

History: 1953 Comp., § 51-30-2, enacted by Laws 1967, ch. 81, § 104.

Compiler's notes. - This section is derived from Section 107 of the ABA Model Business Corporation Act.

Solicitation not transaction of business. - Where court construes previous decisions to hold that mere solicitation of a contract in this state by an agent, to be accepted at a home office in a foreign state, amounts to the transaction of business and that any action thereon is barred, the court errs. *Vernon Co. v. Reed*, 78 N.M. 554, 434 P.2d 376 (1967) (decided under former law).

Foreign public utility has power of eminent domain. - Under this section, 62-1-1 and 62-1-4 NMSA 1978, a foreign public utility authorized to do business in this state has the same right as a domestic public utility to exercise the power of eminent domain in this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979). See 62-1-1.1 NMSA 1978.

### **§ 53-17-3. Corporate name of foreign corporation.**

A. No certificate of authority shall be issued to a foreign corporation unless the corporate name of the corporation:

(1) contains the word "corporation," "company," "incorporated" or "limited," or contains an abbreviation of one of these words, or the corporation, for use in this state, adds at the end of its name one of these words or an abbreviation thereof;

(2) does not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation, or that it is authorized or empowered to conduct a business which a corporation organized under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] is not permitted to transact; and

(3) is not the same as, or confusingly similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state or a name the exclusive right to which is, at the time, reserved in the manner provided in the Business Corporation Act, or the name of a corporation which has in effect a registration of its name as provided in the Business Corporation Act.

B. The provisions of Paragraph (3) of Subsection A of this section shall not apply if the foreign corporation applying for a certificate of authority files with the commission any one of the following:

(1) a resolution of its board of directors adopting a fictitious name for use in transacting business in this state which fictitious name is not confusingly similar to the name of any domestic corporation or of any foreign corporation authorized to transact business in this state or to any name reserved or registered as provided in the Business Corporation Act; or

(2) the written consent of such other corporation or holder of a reserved or registered name to use the same or confusingly similar name and one or more words are added to make such name distinguishable from such other name; or

(3) a certified copy of a final decree of a court of competent jurisdiction establishing the prior right of such foreign corporation to the use of such name in this state.

History: 1953 Comp., § 51-30-3, enacted by Laws 1967, ch. 81, § 105; 1975, ch. 64, § 41.

Compiler's notes. - This section is derived from Section 108 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Corporations §§ 185 to 192. Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 A.L.R.3d 944. 20 C.J.S. Corporations § 1887.

#### **§ 53-17-4. Change of name by foreign corporation.**

Whenever a foreign corporation which is authorized to transact business in this state changes its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of the corporation shall be suspended and it shall not thereafter transact any business in this state until it has changed its name to a name which is available to it under the laws of this state, or has otherwise complied with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-30-4, enacted by Laws 1967, ch. 81, § 106; 1975, ch. 64, § 42.

Compiler's notes. - This section is derived from Section 109 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1975 Amendments to the New Mexico Business Corporation Act," see 6 N.M.L. Rev. 57 (1975).

#### **§ 53-17-5. Application for certificate of authority.**

A. A foreign corporation, in order to procure a certificate of authority to transact business in this state, shall make application therefor to the commission, which application shall set forth:

- (1) the name of the corporation and the state or country under the laws of which it is incorporated;
- (2) if the name of the corporation does not contain the word "corporation," "company," "incorporated" or "limited" or does not contain an abbreviation of one of these words, the name of the corporation with the word or abbreviation which it elects to add thereto for use in this state;
- (3) the date of incorporation and the period of duration of the corporation;
- (4) the address of the principal office of the corporation in the state or country under the laws of which it is incorporated and the address of the principal office of the corporation;
- (5) the address of the proposed registered office of the corporation in this state and the

name of its proposed registered agent in this state at such address;

(6) the purpose of the corporation which it proposes to pursue in the transaction of business in this state;

(7) the names and respective addresses of the directors and officers of the corporation;

(8) a statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes and by series, if any, within a class;

(9) a statement of the aggregate number of issued shares, itemized by class, and by series, if any, within each class;

(10) an estimate expressed in dollars of:

(a) the gross amount of business which will be transacted by it during its current fiscal year at or from places of business located in the state;

(b) the gross amount of business which will be transacted by it during such year, wherever transacted;

(c) the value of all property to be owned by it and located in the state during such year; and

(d) the value of all property to be owned by it during such year, wherever located; and

(11) additional information necessary or appropriate in order to enable the commission to determine whether the corporation is entitled to a certificate of authority to transact business in this state and to determine and assess the fees and franchise taxes payable.

B. The application shall be made on forms prescribed by the commission and shall be executed in duplicate by the corporation by its president or vice president and by its secretary or an assistant secretary and verified by one of the officers signing the application.

History: 1953 Comp., § 51-30-5, enacted by Laws 1967, ch. 81, § 107; 1975, ch. 65, § 2; 1977, ch. 103, § 13; 1983, ch. 304, § 64.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment, in Subsection A, deleted "or purposes" following "purpose" in Paragraph (6), deleted "par value of shares, shares without par value" following "classes" and inserted "by" preceding "series" in Paragraph (8), substituted "by class, and by series, if any, within each class" for "by classes, par value of shares, shares without par value and series, if any, within a class" in Paragraph (9), deleted former

Paragraph (10), which read "a statement, expressed in dollars, of the amount of stated capital of the corporation, as defined in the Business Corporation Act," and redesignated former Paragraphs (11) and (12) as present Paragraphs (10) and (11), respectively.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 110 of the ABA Model Business Corporation Act.

National bank authorized ancillary administrator. - National bank domiciled in another state can act as ancillary administrator without further authorization and, after acquiring a permit under 12 U.S.C. § 248(k), can perform the duties of trustee in the state without obtaining a certificate of authorization to do business in the state from the state corporation commission. 1953-54 Op. Att'y Gen. No. 5881 (rendered under former law).

### **§ 53-17-6. Filing of application for certificate of authority.**

A. Duplicate originals of the application of the corporation for a certificate of authority; a certificate of good standing and compliance issued by the appropriate official of the state or country under the laws of which the corporation is incorporated; and an affidavit executed by the designated registered agent in which he acknowledges his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the designated registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation, shall be delivered to the commission.

B. If the commission finds that the application and the affidavit conform to law, it shall, when all fees have been paid:

(1) endorse on each of the documents the word "filed" and the month, day and year of the filing;

(2) file in its office one of the duplicate originals of the application, the affidavit and the copy of the articles of incorporation and amendments thereto; and

(3) issue a certificate of authority to transact business in this state to which it shall affix the other duplicate original application.

C. The certificate of authority, together with the duplicate original of the application affixed thereto by the commission, shall be returned to the corporation or its representative.

History: 1953 Comp., § 51-30-6, enacted by Laws 1967, ch. 81, § 108; 1977, ch. 103, § 14; 1983, ch. 304, § 65.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "together with a copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated" at the end of Subsection A, substituted "conform" for "conforms" and deleted "and franchise taxes" following "fees" in the introductory language of Subsection B.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 111 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 253, 254.

### **§ 53-17-7. Application for readmission.**

The commission may waive the filing of articles of incorporation or other documents by a corporation making application for a certificate of authority if the documents were filed in connection with a previous application for a certificate of authority.

History: 1953 Comp., § 51-30-6.1, enacted by Laws 1969, ch. 22, § 4.

### **§ 53-17-8. Effect of [certificate of] authority.**

Unless the commission disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, upon delivery of the application for a certificate of authority to the commission, the corporation shall be authorized to transact business in this state for those purposes set forth in its application, subject, however, to the right of this state to suspend or revoke the authority as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978].

History: 1953 Comp., § 51-30-7, enacted by Laws 1967, ch. 81, § 109; 1983, ch. 304, § 66.

The 1983 amendment deleted "certificate of" preceding "authority" in the catchline and substituted "Unless the commission . . . to the commission" for "Upon the issuance of a certificate of authority by the commission" at the beginning of the section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 112 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 272, 275, 277, 279.

### **§ 53-17-9. Registered office and registered agent of foreign corporation.**

Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

A. a registered office which may be, but need not be, the same as its place of business in this state; and

B. a registered agent, which agent may be either an individual resident in this state whose business office is identical with the registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with the registered office.

History: 1953 Comp., § 51-30-8, enacted by Laws 1967, ch. 81, § 110.

Compiler's notes. - This section is derived from Section 113 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations § 263. 20 C.J.S. Corporations § 1815.

### **§ 53-17-10. Change of registered office or registered agent of foreign corporation.**

A. A foreign corporation authorized to transact business in this state may change its registered office or change its registered agent, or both, upon filing in the office of the commission a statement setting forth:

- (1) the name of the corporation;
- (2) the address of its then registered office;

(3) if the address of its registered office is changed, the address to which the registered office is to be changed;

(4) the name of its then registered agent;

(5) if its registered agent is changed:

(a) the name of its successor registered agent; and

(b) an affidavit executed by the successor registered agent in which he acknowledges [acknowledges] his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or an affidavit executed by the president or vice president of a corporation which is the successor registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation; and

(6) that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

B. The statement shall be executed by the corporation by its president or a vice president, and verified by him, and delivered to the commission. If the commission finds that the statement conforms to the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], it shall file the statement in its office, and upon the filing, the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.

C. Any registered agent of a foreign corporation may resign as agent upon filing a written notice thereof, executed in duplicate, with the commission, which shall forthwith mail a copy thereof to the corporation at its principal office in the state or country under the laws of which it is incorporated. The appointment of the agent shall terminate upon the expiration of thirty days after receipt of the notice by the commission.

D. If a registered agent changes his or its business address to another place within the same county, he or it may change the address and the address of the registered office of any corporations of which he or it is registered agent by filing a statement as required above, except that it need be signed only by the registered agent and need not be responsive to Paragraph 5 of Subsection A of this section, and must recite that a copy of the statement has been mailed to each corporation.

History: 1953 Comp., § 51-30-9, enacted by Laws 1967, ch. 81, § 111; 1977, ch. 103, § 15.

Compiler's notes. - This section is derived from Section 114 of the ABA Model Business Corporation Act.

### **§ 53-17-11. Service of process on foreign corporation.**

The registered agent appointed by a foreign corporation authorized to transact business in this state shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served. Nothing in this section limits or affects the right to serve any process, notice or demand, required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

History: 1953 Comp., § 51-30-10, enacted by Laws 1967, ch. 81, § 112.

Cross-references. - For service of process on secretary of state, see 38-1-5 NMSA 1978. For process against foreign corporations, see 38-1-6 NMSA 1978.

Compiler's notes. - This section is derived from Section 115 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 260 to 266.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation, as regards communication to corporation of fact of service, 89 A.L.R. 658.

Who, other than public official, may be served with process in action against foreign corporation doing business in state, 113 A.L.R. 9.

Service of process on officer, director, or stockholder in action against foreign corporation doing business in state, 113 A.L.R. 36.

Statute providing for service of process upon designated state official in action against foreign corporation as applicable to action based on transaction outside of state, 145 A.L.R. 630; 162 A.L.R. 1424.

Requisites of service upon, or delivery to, designated public official, as a condition of substituted service of process on him, 148 A.L.R. 975.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Who is an "agent authorized by employment" to receive service of process within purview of Federal Rules of Civil Procedure and similar state rules and statutes, 26 A.L.R.2d 1086.

Cessation by foreign corporation of business within state as affecting designation of agent for service of process, 77 A.L.R.2d 1477.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 A.L.R.2d 1000.

Federal or state law as controlling, in diversity action, whether foreign corporation is amenable to service of process in state, 6 A.L.R.3d 1103.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A.L.R.3d 625.

20 C.J.S. Corporations §§ 1937 to 1949.

## **§ 53-17-12. Repealed.**

Repeals. - Laws 1983, ch. 304, § 73, repeals 53-17-12 NMSA 1978, relating to amendment of the articles of incorporation of a foreign corporation.

Laws 1983, ch. 304 contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-17-13. Merger of foreign corporation authorized to transact business in this state.**

Whenever a foreign corporation authorized to transact business in this state is a party to a statutory merger permitted by the laws of the state or country under the laws of which it is incorporated, it shall, within thirty days after the merger becomes effective, file with the commission a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which the statutory merger was effected. It is not necessary for the corporation to procure either a new or amended certificate of authority to transact business in this state unless the name of the corporation is changed thereby or unless the corporation desires to pursue in this state other or additional purposes than those which it is then authorized to transact in this state or unless the surviving corporation is to transact business in New Mexico but has not procured a certificate of authority to transact business in this state.

History: 1953 Comp., § 51-30-12, enacted by Laws 1967, ch. 81, § 114; 1983, ch. 304, § 67.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "and the corporation is the surviving corporation" following "incorporated" in the first sentence and added "or unless . . . in this state" at the end of the last sentence.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 117 of the ABA Model Business Corporation Act.

### **§ 53-17-14. Amended certificate of authority.**

A foreign corporation authorized to transact business in this state shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this state other or additional purposes than those set forth in its prior

application for a certificate of authority, by making application therefor to the commission. The requirements in respect to the form and contents of the application, the manner of its execution, the filing of duplicate originals thereof with the commission, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority.

History: 1953 Comp., § 51-30-13, enacted by Laws 1967, ch. 81, § 115.

Compiler's notes. - This section is derived from Section 118 of the ABA Model Business Corporation Act.

### **§ 53-17-15. Withdrawal of foreign corporation.**

A. A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the commission a certificate of withdrawal. In order to procure the certificate of withdrawal, the foreign corporation shall deliver to the commission an application for withdrawal, which shall set forth:

- (1) the name of the corporation and the state or country under the laws of which it is incorporated;
- (2) that the corporation is not transacting business in this state;
- (3) that the corporation surrenders its authority to transact business in this state;
- (4) that the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on the corporation by service thereof on the secretary of state;
- (5) an address to which the secretary of state may mail a copy of any process against the corporation that may be served on it;
- (6) a statement of the aggregate number of shares which the corporation has authority to issue, itemized by class and by series, if any, within each class, as of the date of the application;
- (7) a statement of the aggregate number of issued shares, itemized by class and by series, if any, within each class, as of the date of the application; and
- (8) additional information as necessary or appropriate in order to enable the commission to determine and assess any unpaid fees or franchise taxes payable by the foreign corporation.

B. The application for withdrawal shall be made on forms prescribed by the commission and shall be executed by the corporation by its president or a vice president and by its secretary or an assistant secretary and verified by one of the officers signing the application or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by the receiver or trustee and verified by him.

History: 1953 Comp., § 51-30-14, enacted by Laws 1967, ch. 81, § 116; 1977, ch. 103, § 16; 1983, ch. 304, § 68.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment, in Subsection A, substituted "by class and by series, if any, within each class" for "by classes, par value of shares, shares without par value and series, if any, within a class" in Paragraphs (6) and (7), deleted former Paragraph (8), which read "a statement, expressed in dollars, of the amount of stated capital of the corporation, as of the date of the application," and redesignated former Paragraph (9) as present Paragraph (8).

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 119 of the ABA Model Business Corporation Act.

Jurisdiction despite withdrawal of company. - In action for damages for breach of contract, court acquired jurisdiction of the person or the res although the contracts were entered into outside the state and although the cause of action, if any, accrued after the company had ceased to do business in the state because the cause of action was for breach of a contract entered into while the company was legally authorized to transact business in the state. *Wester v. Trailmobile Co.*, 59 N.M. 73, 279 P.2d 526 (1955).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 313 to 315.

Withdrawal of foreign corporation from state as affecting conditions under which it may be readmitted to do business in state and its rights and duties if readmitted, 110 A.L.R. 528.

Withdrawal of foreign corporation from state as tolling statute of limitations as to action against corporation, 133 A.L.R. 774.

## **§ 53-17-16. Filing of application for withdrawal.**

A. Duplicate originals of an application for withdrawal shall be delivered to the commission. If the commission finds that the application conforms to the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], and that the

corporation has complied with the Tax Administration Act [Chapter 7, Article 1 NMSA 1978], and has paid all contributions required by the Unemployment Compensation Law [Chapter 51 NMSA 1978], it shall, when all fees and franchise taxes have been paid:

- (1) endorse on each of the duplicate originals the word "filed," and the month, day and year of the filing;
- (2) file one of the duplicate originals in its office; and
- (3) issue a certificate of withdrawal to which it shall affix the other duplicate original.

B. The certificate of withdrawal, together with the duplicate original of the application for withdrawal affixed thereto by the commission, shall be returned to the corporation or its representative. Upon the issuance of the certificate of withdrawal, the authority of the corporation to transact business in this state shall cease.

History: 1953 Comp., § 51-30-15, enacted by Laws 1967, ch. 81, § 117.

Compiler's notes. - This section is derived from Section 120 of the ABA Model Business Corporation Act.

### **§ 53-17-17. Revocation of certificate of authority.**

A. The certificate of authority of a foreign corporation to transact business in this state may be revoked by the commission upon the conditions prescribed in this section when:

- (1) the corporation has failed to file its annual report timely, or has failed to pay any fees or franchise taxes, or penalties thereon, when they became due; or
- (2) the corporation has failed to appoint and maintain a registered agent in this state as required by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978]; or
- (3) the corporation has failed, after change of its registered office or registered agent, to file in the office of the commission a statement of the change as required by the Business Corporation Act; or
- (4) the corporation has failed to file in the office of the commission any amendment to its articles of incorporation or any articles of merger within the time prescribed by the Business Corporation Act; or
- (5) a misrepresentation has been made of any material matter in any application, report, affidavit or other document submitted by the corporation pursuant to the Business Corporation Act.

B. No certificate of authority of a foreign corporation shall be revoked by the commission

unless:

(1) it has given the corporation not less than sixty days' notice thereof by mail addressed to its registered office in this state, and also either to the principal office of the corporation in the state or country under the laws of which it is incorporated or to the principal office of the corporation as each address is shown in the last annual report filed with the commission; and

(2) the corporation fails prior to revocation, to file the annual report, or pay the fees, franchise taxes or penalties, or file the required statement of change of registered agent or registered office, or file the articles of amendment or articles of merger or correct the misrepresentation.

History: 1953 Comp., § 51-30-16, enacted by Laws 1967, ch. 81, § 118; 1977, ch. 103, § 17.

Compiler's notes. - This section is derived from Section 121 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 215 to 218.

20 C.J.S. Corporations § 1843.

### **§ 53-17-18. Issuance of certificate of revocation.**

A. Upon revoking any certificate of authority, the commission shall:

(1) issue a certificate of revocation in triplicate;

(2) file one of the certificates in its office; and

(3) mail to the corporation at its registered office in this state and also either to its principal office in the state or country under the laws of which it is incorporated or to the principal office of the corporation at the addresses as shown in the last annual report filed with the commission a notice of the revocation accompanied by one of the certificates.

B. Upon the issuance of the certificate of revocation, the authority of the corporation to transact business in this state shall cease.

History: 1953 Comp., § 51-30-17, enacted by Laws 1967, ch. 81, § 119; 1977, ch. 103, § 18.

Compiler's notes. - This section is derived from Section 122 of the ABA Model Business Corporation Act.

## **§ 53-17-19. Application to corporations heretofore authorized to transact business in this state.**

Foreign corporations which are authorized to transact business in this state at the time the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] takes effect, for a purpose or purposes for which a corporation might secure such authority under the Business Corporation Act, shall, subject to the limitations set forth in their respective certificates of authority, be entitled to all the rights and privileges applicable to foreign corporations procuring certificates of authority to transact business in this state under the Business Corporation Act, and from the time the Business Corporation Act takes effect, the corporations are subject to all the limitations, restrictions, liabilities and duties prescribed in the Business Corporation Act for foreign corporations procuring certificates of authority to transact business in this state under the Business Corporation Act.

History: 1953 Comp., § 51-30-18, enacted by Laws 1967, ch. 81, § 120.

Effective dates. - Laws 1967, ch. 81, § 136, makes the Business Corporation Act effective on January 1, 1968.

Compiler's notes. - This section is derived from Section 123 of the ABA Model Business Corporation Act.

## **§ 53-17-20. Transacting business without certificate of authority.**

A. No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state, until the corporation has obtained a certificate of authority. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of the corporation on any right, claim or demand arising out of the transaction of business by the corporation in this state, until a certificate of authority has been obtained by the corporation or by a corporation which has acquired all or substantially all of its assets.

B. The failure of a foreign corporation to obtain a certificate of authority to transact business in this state does not impair the validity of any contract or act of the corporation, and does not prevent the corporation from defending any action, suit or proceeding in any court of this state.

C. A foreign corporation which transacts business in this state without a certificate of authority is liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees and franchise taxes which would have been imposed upon the corporation had it applied for and received a certificate of authority to transact business in this state as required by

the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], and thereafter filed all annual reports required by it, plus all penalties for failure to pay the fees and franchise taxes, plus a civil penalty of two hundred dollars (\$200) for each offense.

History: 1953 Comp., § 51-30-19, enacted by Laws 1967, ch. 81, § 121; 1969, ch. 22, § 5.

Compiler's notes. - This section is derived from Section 124 of the ABA Model Business Corporation Act.

Section bars foreign corporation from maintaining any action in any New Mexico state court until it has obtained a certificate of authority. *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313 (10th Cir. 1972).

But contracts not void. - Contracts made by unauthorized foreign corporation in the state are not void, rather the corporation is merely prevented from suing upon them until it complies. *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313 (10th Cir. 1972).

Acts not constituting transacting business in state. - Where the initial contact between parties is through the mails, and, thereafter, the parties execute a contract signed by plaintiff in Spokane and then by defendants in New Mexico, plaintiff's foreign corporation is not transacting business in New Mexico and may sue under this section. *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313 (10th Cir. 1972).

Texas company's representative in New Mexico who only solicits offers for contracts which are relayed back to Texas for acceptance is not transacting business in New Mexico and is not barred from suing in New Mexico on contract by this section. *Don J. Cummings Co. v. Aluminum Mfg. Corp.* 371 F.2d 118 (10th Cir. 1967).

Making of a sale which is primarily interstate in nature does not of itself subject the corporation to the state's certification provisions. *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313 (10th Cir. 1972).

Acceptance of offer in state. - No cases actually consider the sole act of accepting an offer in New Mexico as enough to require certification. *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313 (10th Cir. 1972).

Unauthorized business may not compel arbitration. - Texas corporations unauthorized to do business in New Mexico were unable to compel two dentists to arbitrate a dispute arising from an alleged breach of architectural and construction contracts for the construction of dental offices, because arbitration is in the nature of specific performance and the unauthorized corporations cannot specifically perform, as they are not licensed to do business in the state. *Shaw v. Kuhnel & Assocs.*, 102 N.M. 607, 698 P.2d 880 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Foreign Corporations §§ 280 to 294.

Applicability to foreign corporations of statute precluding defense of want of legal organization, 73 A.L.R. 1202.

Right to assert mechanic's lien as affected by failure of foreign corporation to comply or delay in complying with condition of its right to do business, 95 A.L.R. 367.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 118 A.L.R. 646.

Foreign corporation's rights in respect of property sold under conditional sale as affected by failure to comply with conditions of doing business in state, 130 A.L.R. 999.

Federal court, right of foreign corporation or its assignee to maintain an action which it could not have maintained in state court because of noncompliance with conditions of doing business in state, 133 A.L.R. 1171.

Rule that in general inhibits foreign corporation which has failed to comply with conditions of doing or continuing business in state, or domestic corporation which has forfeited its charter, from maintaining action, as applicable to action at law to vindicate corporation's property rights against tort-feasor, 136 A.L.R. 1160.

Effect of execution of foreign corporation's contract which, while executory, was unenforceable because of noncompliance with conditions of doing business in state, 7 A.L.R.2d 256.

Rights of assignee or subsequent holder of negotiable paper executed to a foreign corporation doing business in state without compliance with local requirements, 80 A.L.R.2d 465.

Compliance after commencement of action as affecting application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute, 6 A.L.R.3d 326.

Construction work by foreign corporation as doing business for purposes of statute requiring foreign corporation to qualify as condition of access to local courts, 90 A.L.R.3d 929.

20 C.J.S. Corporations §§ 1843 to 1864.

## **Article 18**

### **Business Corporations; Miscellaneous Provisions**

#### **§ 53-18-1. Powers of commission.**

The commission has the power and authority reasonably necessary to enable it to administer the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] efficiently and to perform the duties therein imposed upon it.

History: 1953 Comp., § 51-31-1, enacted by Laws 1967, ch. 81, § 122.

Compiler's notes. - This section is derived from Section 139 of the ABA Model Business Corporation Act.

## **§ 53-18-2. Appeal from commission.**

A. If the commission fails to approve any articles of incorporation, amendment, merger, consolidation or dissolution or any other document required by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] to be approved by the commission before it is filed in its office, it shall, within fifteen working days after the delivery thereof to it, give written notice of its disapproval to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. From the disapproval, the person or corporation may appeal to the district court of Santa Fe county by filing with the clerk of the court a petition setting forth the articles or other document sought to be filed and a copy of the written disapproval thereof by the commission, whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the commission or direct it to take action the court may deem proper.

B. If the commission revokes the certificate of authority to transact business in this state of any foreign corporation pursuant to the provisions of the Business Corporation Act, the foreign corporation may appeal to the district court of Santa Fe county by filing with the clerk of the court a petition setting forth a copy of its certificate of authority to transact business in this state and a copy of the notice of revocation given by the commission, whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the commission or direct it to take action the court may deem proper.

C. Appeals from all final orders and judgments entered by the district court of Santa Fe county under this section in review of any ruling or decision of the commission may be taken as in other civil actions.

History: 1953 Comp., § 51-31-2, enacted by Laws 1967, ch. 81, § 123; 1983, ch. 304, § 69.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment substituted "fifteen working days" for "ten days" near the middle of the first sentence of Subsection A.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 140 of the ABA Model Business Corporation Act.

Law reviews. - For article, "How to Stand Still Without Really Trying: A Critique of the New Mexico Administrative Procedure Act," see 10 Nat. Resources J. 840 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 C.J.S. Corporations § 50; 20 C.J.S. Corporations §§ 1915, 1958.

### **§ 53-18-3. Issuance of certificate of good standing and compliance.**

The commission may issue a certificate of good standing and compliance if the corporation requesting the certificate has paid all fees due at the time of the request.

History: 1953 Comp., § 51-31-2.1, enacted by Laws 1977, ch. 103, § 19; 1983, ch. 304, § 70.

Cross-references. - For definition of "commission," see 53-11-2L NMSA 1978.

The 1983 amendment deleted "franchise taxes and" preceding "fees".

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **§ 53-18-4. Certificates and certified copies to be received in evidence.**

All certificates issued by the commission in accordance with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978], and all copies of documents filed in its office in accordance with the provisions of the Business Corporation Act, when certified by it, shall be taken and received in all courts, public offices and official bodies as prima facie evidence of the facts therein stated, and may be filed and recorded with the respective county clerks. A certificate by the commission under its seal, as to the existence or nonexistence of the facts relating to corporations shall be taken and received in all courts, public offices and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

History: 1953 Comp., § 51-31-3, enacted by Laws 1967, ch. 81, § 124.

Compiler's notes. - This section is derived from Section 141 of the ABA Model Business Corporation Act.

### **§ 53-18-5. Forms to be furnished by commission.**

Forms for all documents to be filed in the office of the commission may be furnished by the commission on request therefor, but the use thereof unless otherwise specifically prescribed by law, is not mandatory.

History: 1953 Comp., § 51-31-4, enacted by Laws 1967, ch. 81, § 125.

Compiler's notes. - This section is derived from Section 142 of the ABA Model Business Corporation Act.

## **§ 53-18-6. Greater voting requirements.**

Whenever a section of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] specifies the vote of the holders of a certain proportion of the shares, or of any class or series thereof, for the taking of any action by the shareholders of a corporation, the articles of incorporation may require a greater proportion. An amendment to the articles of incorporation which adds, changes or deletes a provision for a greater proportion must be adopted by the same vote as would be required to take action under the provision to be adopted or then in effect, whichever is greater.

History: 1978 Comp., § 53-18-6, enacted by Laws 1983, ch. 304, § 71.

Repeals and reenactments. - Laws 1983, ch. 304, § 71, repeals former 53-18-6 NMSA 1978, relating to greater voting requirements, and enacts the above section.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - This section is derived from Section 143 of the ABA Model Business Corporation Act.

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

### **§ 53-18-6.1. Voting requirements; existing corporations.**

The provisions of these 1983 amendments to the Business Corporation Act lowering voting requirements from a two-thirds majority to a simple majority shall not apply to any corporation in existence on the effective date of this section until the corporation, by amendment to its articles of incorporation, chooses to become subject to those provisions.

History: 1978 Comp., § 53-18-6.1, enacted by Laws 1983, ch. 304, § 72.

Effective dates. - Laws 1983, ch. 304, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

Compiler's notes. - The phrase "these 1983 amendments to the Business Corporation Act lowering voting requirements" refers to those sections of the Business Corporation Act, 53-11-1 to 53-18-12 NMSA 1978, amended by Laws 1983, Chapter 304, i.e., 53-13-2, 53-14-3, 53-15-2, 53-16-3 and 53-16-8 NMSA 1978.

Law reviews. - For article, "1983 Amendments to the New Mexico Business Corporation Act and Related Statutes," see 14 N.M.L. Rev. 371 (1984).

Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Personal liability of stockholder, officer, or agent for debt of foreign corporation doing business in the state, 27 A.L.R.4th 387.

### **§ 53-18-7. Waiver of notice.**

Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] or under the provisions of the articles of incorporation or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to the notice, whether before or after the time stated therein, is equivalent to the giving of the notice.

History: 1953 Comp., § 51-31-6, enacted by Laws 1967, ch. 81, § 127.

Compiler's notes. - This section is derived from Section 144 of the ABA Model Business Corporation Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18A Am. Jur. 2d Corporations §§ 467 to 469, 652, 653, 969, 971, 972, 980 to 983, 1082 to 1084, 1086, 1087; 18B Am. Jur. 2d Corporations §§ 1368, 1370, 1459, 1480, 1481.  
18 C.J.S. Corporations §§ 361, 544; 19 C.J.S. Corporations §§ 720, 745.

### **§ 53-18-8. Action by shareholders without a meeting.**

Any action required by the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] to be taken at a meeting of the shareholders of a corporation, or any action which may be taken at a meeting of the shareholders, may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all of the shareholders entitled to vote with respect to the subject matter thereof. Such consent has the same effect as a unanimous vote of shareholders, and may be stated as such in any articles or document filed with the commission under the Business Corporation Act.

History: 1953 Comp., § 51-31-7, enacted by Laws 1967, ch. 81, § 128.

Compiler's notes. - This section is derived from Section 145 of the ABA Model Business Corporation Act.

### **§ 53-18-9. Unauthorized assumption of corporate powers.**

All persons who assume to act as a corporation without authority to do so are jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

History: 1953 Comp., § 51-31-8, enacted by Laws 1967, ch. 81, § 129.

Compiler's notes. - This section is derived from Section 146 of the ABA Model Business Corporation Act.

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

### **§ 53-18-10. Application to existing corporations.**

A. The provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] apply to all existing corporations organized under any general act of this state providing for the organization of corporations for a purpose or purposes for which a corporation might be organized under the Business Corporation Act, where the power has been reserved to amend, repeal or modify the act under which the corporation was organized and where the act is repealed by the Business Corporation Act.

B. The provisions of the Business Corporation Act also apply to the special class of corporations known as "no stockholder liability" corporations organized under Laws 1905, Chapter 79, Section 23 [53-2-8 NMSA 1978], as amended, but no stockholder's liability for unpaid stock shall attach to any shares issued by such corporations which continue to comply with the requirements set forth in Laws 1905, Chapter 79, Section 23, as amended.

History: 1953 Comp., § 51-31-9, enacted by Laws 1967, ch. 81, § 130.

Compiler's notes. - This section is derived in part from Section 147 of the ABA Model Business Corporation Act.

Legislative intent. - The legislature intends the Business Corporation Act to operate retrospectively except as it may affect substantive rights. *Prager v. Prager*, 80 N.M. 773, 461 P.2d 906 (1969).

Law reviews. - Annual Survey of New Mexico Corporate Law, see 17 N.M.L. Rev. 253 (1987).

## **§ 53-18-11. Application to foreign and interstate commerce.**

The provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] apply to commerce with foreign nations and among the several states only insofar as permitted under the provisions of the constitution of the United States.

History: 1953 Comp., § 51-31-10, enacted by Laws 1967, ch. 81, § 131.

Compiler's notes. - This section is derived from Section 148 of the ABA Model Business Corporation Act.

## **§ 53-18-12. Reservation of power.**

The legislature reserves power to amend, repeal or modify all or any part of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] at any time and such changes shall be binding upon all corporations subject to the provisions of the Business Corporation Act.

History: 1953 Comp., § 51-31-11, enacted by Laws 1967, ch. 81, § 132.

Effective dates. - Laws 1967, ch. 81, § 136, makes the Business Corporation Act effective on January 1, 1968.

Saving clauses. - Laws 1967, ch. 81, § 133, provides that the act does not affect rights accrued or acquired, or liabilities or penalties incurred, under the former act prior to its repeal.

Severability clauses. - Laws 1967, ch. 81, § 134, provides for the severability of the act if any part or application thereof is held invalid.

Compiler's notes. - This section is derived from Section 149 of the ABA Model Business Corporation Act.