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The Philosophies of the New York Business Corporation Law of 1961

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THE PHILOSOPHIES OF THE NEW YORK BUSINESS CORPORATION LAW OF 1961†

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THE New York Business Corporation Law of 1961[1] is an eclectic statute, both in provisions and in philosophies. In large measure, it is a restatement and a clarification of existing New York law, but important changes have also been made.[2] Little in the statute is entirely new,[3] but its peculiar combination of features is novel and, to some extent, paradoxical.

The near-culmination[4] of a five-year program costing more than a third of a million dollars,[5] the Business Corporation Law is the product of a Joint Legislative Committee to Study Revision of Corporation Laws,[6] and the

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1. N.Y. Sess. Laws 1961, ch. 855; Senate Int. 522, Pr. 4061 (passed March 21, 1961); Assembly Int. 855, Pr. 5310 (passed March 22, 1961); signed by Governor, April 24, 1961. The new law, while chapter 4 of the Consolidated Laws, is Book 6 of McKinney's Consolidated Laws. Stevens, New York Business Corporation Law of 1961, 47 Cornell L.Q. 141-174 (1962); Kessler, The New York Business Corporation Law, 36 St. John's L. Rev. 1-108 (1961); Anderson and Lesher, The New Business Corporation Law, 33 N.Y.S. Bar J. 308-315, 428-434 (1961); 2 Hornstein, Corporation Law and Practice, 79 et seq. (Supp. 1961); Rohrlich, Organizing Corporate and Other Business Enterprises (Supp. 1961); New York Comparison of Domestic Features of General Corporation Law and Stock Corporation Law and the New Business Corporation Law (The Corporation Trust Company, 1962). As to effective date, see note 23 infra.

2. See Governor's Memorandum of Approval.

3. Except for current accounting concepts codified in Article 5, which differ from those incorporated only a few years previous in the Model Business Corporation Act. Preface to 1950 Revision of Model Business Corporation Act, reprinted in Interim Report to 1957 Session of New York State Legislature (Legis. Doc. (1957), No. 17), pp. 104-106 (hereinafter referred to as "1957 Interim Report"). See notes 44, 103 infra. See also text accompanying notes 57-87 infra.

4. Revisions in the Business Corporation Law during both the 1962 and the 1963 legislative sessions are contemplated. See Amendatory Bills, Assembly Int. 4918, Pr. 5212 (Feb. 20, 1962), Senate Int. 3773, Pr. 4286 (Mar. 8, 1962), Senate Int. 3774, Pr. 4287 (Mar. 8, 1962) (hereinafter referred to as "Amendatory Bills"), all of which were enacted.

The work of the Joint Legislative Committee to Study Revision of Corporation Laws has been projected also to include: (1) Revision of the special stock corporations laws and ultimate repeal of the Stock Corporation Law (see text accompanying note 22 infra): (a) Cooperation in revising the Banking Law; (b) Cooperation in revising the Insurance Law; (c) Revision of the Railroad Law; (d) Revision of the Transportation Corporations Law; (e) Revision of the Cooperative Corporations Law; and (2) Preparation of a Non-Profit Corporation Law and accommodation thereto of the General Corporation Law. Fifth Interim Report to 1961 Session of New York Legislature (Legis. Doc. (1961), No. 12), pp. 30-31 (hereinafter referred to as "Fifth (1961) Interim Report"). Unmentioned are the several statutes relating to "public corporations" (see note 19 infra).

5. 1956: $30,000; 1957: $75,000; 1958: $75,000; 1959: $75,000; 1960: $65,000; 1961: $75,000; 1962: $65,000 (specific advance appropriations).

6. Created by Joint Resolution No. 27, March 22, 1956 (composed of three members of the Senate and four members of the Assembly). By the terms of the resolution,

result of several years of agitation for corporate law revision by the New York State Bar Association.[7]

As a composite work of multiple authorship,[8] based on existing New York—both statutory and decisional—law, provisions in the Model Business Corporation Act and other modern corporate statutes,[9] current accounting principles,[10] and the accumulated corporate experiences of innumerable persons, the philosophies of the Business Corporation Law obviously reflect, at least in compromise versions, the wide variety of thinking inherent in such broad-ranging sources.

What the Joint Legislative Committee in fact did, is, of course, far more important than what it said it was doing, but the latter nevertheless remains relevant.

The attitudes of the Joint Legislative Committee can be gleaned from the five ad interim reports of the Committee to the Legislature for the 1957, 1958, 1959, 1960 and 1961 sessions,[11] and other matters of public record.[12]

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the purpose of the Committee was to conduct "a comprehensive study of the body of law, statutes, decisional law and legal literature of the state pertaining in any manner to corporations organized or which may affect corporations to be organized within the state." 1957 Interim Report, pp. 9, 54 (quaere, as to silence concerning foreign corporations).

7. Hatch, 1953 Corporation Laws, 25 N.Y.S. Bar Bull. 198-205 (June 1953); Hatch, 1954 Corporation Laws, 26 N.Y.S. Bar Bull. 149-154 (June 1954); Hatch, 1955 Corporation Laws, 27 N.Y.S. Bar Bull. 323-328 (July 1955); Memorandum: A Look at Corporation Law Revision, 30 N.Y.S. Bar Bull. 71-84 (Feb. 1957).

8. Of the seven original 1956 Committee members, only two were members in 1961. The present chairman, Senator Warren M. Anderson, of Binghamton, became chairman in 1959 but had not previously been a Committee member. Robert S. Lesher, of Buffalo, and Dean Emeritus Robert S. Stevens, of the Cornell Law School, have served continuously as counsel and chief consultant, respectively. Of the other consultants, only two served throughout the 1957-1961 period. The chairmanship and membership of the New York State Bar Association Committee on Corporation Law during the same period remained relatively constant; one third of the membership of the Association of the Bar of the City of New York Committee on Corporate Law changes every year which may account for its somewhat more progressive attitudes.

9. See text accompanying notes 84-87 infra.

10. Compare drafts of financial definitions in definitional section in Article 1 and corporate finance provisions in Article 5 in the three bills which were introduced. See note 122 infra. Among the rejected concepts was the provision that "the term 'stock dividend' or 'share dividend' [if used in any notice to recipient shareholders] . . . shall be expressly stated to be applicable only to the number of distributed shares as to which a transfer has been made from earned surplus to stated capital, or to stated capital and capital surplus, in an amount equal to their aggregate fair value as determined by the directors." See Senate Int. 3124, Pr. 3316, § 5.12(a)(5) [First Bill]. Vestiges remain in approach that "share distributions" may be (a) share splits, (b) share dividends, or (c) something else without a specific name. Cf. also § 511(e), as amended ("Nothing in this section shall prevent a corporation from making supplementary transfers from earned surplus to stated capital or capital surplus in connection with share distributions or otherwise"). The Model Business Corporation Act follows the more traditional test that a share dividend involves increasing the stated capital and that a share split does not, and does not require that the *fair value* be capitalized at all, much less out of *earned* surplus. ABA-ALI Model Bus. Corp. Act § 40 (1953).

11. 1957 Interim Report (138 pp.); Second Interim Report to 1958 Session of New York State Legislature (Legis. Doc. (1958), No. 23) (108 pp.) (hereinafter referred to "Second (1958) Interim Report"); Third Interim Report to 1959 Session of New York State Legislature (Legis. Doc. (1959), No. 39) (169 pp.) (hereinafter referred to as "Third (1959) Interim Report"); Fourth Interim Report to 1960 Session of New York State

These reports and records are replete with the pronouncement of six working principles: (1) There should be a single unified, self-sufficient corporate statute applicable to all business corporations doing business in New York;[13] (2) The new Business Corporation Law should be well-drafted;[14] (3) It should be modern, retaining the best of existing New York law, eliminating anachronisms, and drawing on sound examples elsewhere;[15] (4) It should be workable, simplifying and clarifying procedural requirements and providing maximum flexibility for internal corporate affairs;[16] (5) It should encourage corporate business in New York by fostering New York incorporation and the retention of existing business corporations;[17] and (6) It should soundly balance the various interests involved.[18]

Single, Unified, Self-Sufficient Business Corporation Law

At the present time, all corporations in New York—public,[19] stock,[20]

Legislature (Legis. Doc. (1960), No. 15) (84 pp.) and Supplement (containing Revisers' Notes and Comments on Senate Int. 3124, Pr. 3316 [First Bill] (111 pp.)) (hereinafter referred to as "Fourth (1960) Interim Report"); Supplement to Fifth (1961) Interim Report (containing Revisers' Notes and Comments on Senate Int. 522, Pr. 522, Assembly Int. 885, Pr. 885 [Second Bill] (93 pp.)); Fifth (1961) Interim Report (80 pp.) and Revised Supplement (containing Revisers' Notes and Comments on Senate Int. 522, Pr. 4061, Assembly Int. 885, Pr. 5310 [Third Bill, which was enacted] (94 pp.)). The Fifth (1961) Interim Report was published after the 1961 session; the Sixth (1962) Interim Report has not yet been published.

12. E.g., Governor's Memorandum of Approval; Explanatory Memorandum on Business Corporation Law (March 13, 1961), reprinted in Fifth (1961) Interim Report, pp. 55-80 (cf. version of January 23, 1961); the three bills themselves (see note 122 infra) and the Amendatory Bills (see note 4 supra); transcripts of the public hearings on the first and second bills (see note 126 infra); 142 research reports (listed in Fourth (1960) Interim Report, pp. 63-67); summaries of researchers' reports; final research recommendations; working drafts; staff drafts; committee drafts. Too voluminous for publication, these and other files of the Committee, in due course, will become available in the Legislative Reference Library of the State Education Department. This legislative history should prove most helpful in construing the new law, although the earlier formulations are more substantially documented than are the provisions of the Third Bill which was enacted and of the Amendatory Bills (see note 4 supra). Some of the comments raise possible problems. E.g., former comment that § 403 "codifies the de facto doctrine"; comment that § 509 authority to issue fractions of shares is in part a practical substitute for N.Y. Stock Corp. Law § 74 permitting the issue of certificates for partly-paid shares, which is omitted from the new law.

13. 1957 Interim Report, pp. 13, 49-50; Second (1958) Interim Report, pp. 43-44; Third (1959) Interim Report, p. 44. See text accompanying notes 19-38 infra.

14. 1957 Interim Report, pp. 49-51; Second (1958) Interim Report, p. 43; Third (1959) Interim Report, pp. 147-153. See text accompanying notes 39-56 infra.

15. 1957 Interim Report, pp. 10-13; Second (1958) Interim Report, p. 9. See text accompanying notes 57-87 infra.

16. 1957 Interim Report, p. 50; Second (1958) Interim Report, p. 43; Third (1959) Interim Report, p. 45. See text accompanying notes 88-97 infra.

17. 1957 Interim Report, pp. 50, 54; Second (1958) Interim Report, p. 43; Third (1959) Interim Report, p. 45. See text accompanying notes 98-109 infra.

18. 1957 Interim Report, pp. 50-51; Third (1959) Interim Report, p. 45; Fourth (1960) Interim Report, p. 10; Fifth (1961) Interim Report, p. 29. See text accompanying notes 110-133 infra.

19. Defined as including a "municipal corporation" (including county, city, town, village, and school district), "district corporation," and "public benefit corporation." N.Y. Gen. Corp. Law §§ 2, 3(1), (2), (3), (4).

20. Defined as "a corporation having shares of stock and which is authorized by law to distribute dividends to the holders thereof." N.Y. Gen. Corp. Law § 3(5). In-

and non-stock[21]—are governed by a three-tier structure of corporate statutes (involving some twenty-five chapters of the Consolidated Laws of New York), which, subject to the Federal Constitution, laws and treaties, and the New York Constitution, can be charted as on page 443.[22]

On and after the effective date[23] of the Business Corporation Law, the goal of having a single, unified, self-sufficient corporate statute applicable to "business corporations,"[24] instead of the hodge-podge of provisions in the Stock Corporation Law and General Corporation Law,[25] will be realized.

In keeping with the single-statute goal, the policy almost from the start of the revision program was not to afford separate statutory treatment to close corporations, in the sense of a separate close corporation statute,[26] but to make every effort to accommodate the legitimate needs of the close corporation within a single statute applicable to all business corporations.[27]

The implementation of this policy in the new law is obvious. No less than sixteen sections—all but four of them new to New York corporate

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cluded are a "moneyed corporation" (corporation formed under or subject to the Banking Law or the Insurance Law), "railroad corporation," "transportation corporation," "business corporation," "cooperative corporation." N.Y. Gen. Corp. Law §§ 2, 3(6), (7), (8), (9), (10). Cf. note 24 infra.

21. Defined as every corporation other than a "stock corporation" (supra note 20) or a "public corporation" (supra note 19). N.Y. Gen. Corp. Law § 3(11).

22. Henn on Corporations and Other Business Enterprises, pp. 25, 26 (1961). See Lesher, Revision of the New York Corporation Statutes, 14 Bus. Law. 807-723 (April 1959); Lesher, Revising Our Corporation Laws, 12 Record of N.Y.C.B.A. 265-285 (May 1957); New York Laws Affecting Business Corporations, pp. vii-xi (42d ed. 1961).

23. April 1, 1963, but being extended to September 1, 1963. Amendatory Bills. The original delayed effective date was to permit legislative improvements during the 1962 and 1963 sessions, and also to enable existing business corporations to hold two annual shareholder meetings and to amend their certificates of incorporation and by-laws. The thirty-day period for the Governor to approve any 1963 bills would have just commenced on April 1, 1963. Many annual shareholder meetings are held after April 1 in each year. The new law makes no provision for amendatory filings of the certificate of incorporation or of other certificates in the Department of State effective as of the effective date of the new law. The effective date conceivably could be extended further, say, to September 1, 1964. See note 82 infra.

24. The term "business corporation" is defined by present law as "a corporation formed under or subject to the stock corporation law, other than a moneyed corporation, a railroad corporation, a transportation corporation, a cooperative corporation, or a corporation chartered by the regents of the university." N.Y. Gen. Corp. Law § 3(9). Cf. note 20 supra. The term is not defined in the new law (see note 52 infra) but presumably includes every "corporation" or "domestic corporation" and "foreign corporation," which terms are defined. See notes 44, 47 infra.

25. N.Y. Bus. Corp. Law § 103(a) (application of Business Corporation Law), § 103(e) (non-application of General Corporation Law and Stock Corporation Law). Pending further revision (see note 4 supra), the General Corporation Law and the Stock Corporation Law, because of their part in the three-tier structure concerning corporations other than business corporations, cannot be repealed.

26. Winer, Proposing a New York "Close Corporation Law," 28 Cornell L.Q. 313 (1943) (with draft of New York Close Corporation Law as appendix); Weiner, Legislative Recognition of the Close Corporation, 27 Mich. L. Rev. 273 (1929); Comment, A Plea for Separate Statutory Treatment of the Close Corporation, 33 N.Y.U.L. Rev. 700 (1958); Notes, 71 Harv. L. Rev. 1498 (1958), 52 Nw. U.L. Rev. 297 (1957).

27. Fleming, Desirability of Enacting Separate Statutes for Closely Held and Publicly Owned Corporations, 1957 Interim Report, pp. 115-129. Similar is the approach of the Model Business Corporation Act, although it is far less accommodating to the special problems of close corporations.

United States Constitution—Federal Laws—Treaties
New York State Constitution
Gen. Corp. Law (applicable to all corporations insofar as possible and not in conflict with special provisions of other corporate laws)
Stock Corp. Law (stock corporations)
Bank. Law (bank. corps.)
Ins. Law (ins. corps.)
R.R. Law (R.R. corps.)
Trans. Corp. Law (trans. corps.)
Coop. Corp. Law (stock coop. corps.)
(business corps.)
(non-stock corporations)
Relig. Corp. Law (relig. corps.)
Membership Corp. Law (membership corps.)
Educ. Law (educ. corps.)
Benev. Orders Law (fraternal orders)
Coop. Corp. Law (non-stock coop. corps.)
Gen. Munic. Law (public corporations)
County Law
Alternative County Government Law
General City Law
Second Class Cities Law
Town Law
Village Law
Education Law (school districts)
Conservation Law (river improvement districts)
Public Authorities Law

statutes—have attempted to meet the special problems of the close corporation.[28] Some of these by their terms apply only to close corporations;[29] others, while theoretically available to all corporations, will as a practical matter be availed of only by close corporations.[30]

Many of the close corporation provisions had their genesis in the North Carolina Business Corporation Act of 1955.[31] The new New York statutory provisions, if given sympathetic construction by the Department of State[32] and the courts,[33] could improve substantially the lot of the close corporations

28. N.Y. Bus. Corp. Law § 401 (single incorporator), § 514 (agreement by corporation to purchase its own shares), § 609(f)(5) irrevocable proxy to implement shareholder voting agreement), § 615 (unanimous shareholder written consent without meeting), § 616 (greater-than-normal shareholder quorum/vote), § 620(a) (shareholder voting agreement), § 617 (shareholder class voting), § 620(b) (certificate of incorporation provision restricting discretion or powers of board of directors—quaere, as to positive rather than negative language in § 620(b)(2) and relation between notice provision thereof and share certificate legend requirement of § 620(f), as amended), § 701 (board of directors management subject to § 620(b) provision), § 703 (election of director or directors by shareholder class voting), § 706 (removal of directors), § 707 (minimum board of directors quorum of one-third, i.e., one director of authorized three-director board), § 709 (greater-than-normal board of directors quorum/vote), § 715 (election of officers by shareholders), § 716 (removal of officers by shareholders), § 1104 (judicial dissolution in event of deadlock), § 1105 (certificate of incorporation provision for dissolution by shareholder(s) at will or upon occurrence of specified event—being moved by Amendatory Bills to § 1002 in Article 10 (Non-Judicial Dissolution)). Sections 616 and 709 are derived from N.Y. Stock Corp. Law § 9, Section 707 from N.Y. Gen. Corp. Law § 27, and Section 1104 from N.Y. Gen. Corp. Law § 103. Quaere, as to amendment of certificate of incorporation provisions under §§ 616, 620(b) or 709 by only two-thirds shareholder vote. §§ 616 (b), 620(d), 709(b); as to amendment of § 1002, as amended, provision by simple majority shareholder vote. The Amendatory Bills would permit one director in a one-shareholder corporation and two directors in a two-shareholder corporation, as does Delaware. Stevens, Close Corporations and the New York Business Corporation Law of 1961, infra p. 481; Hoffman, New Horizons for the Close Corporation in New York under Its New Business Corporation Law, 28 Brooklyn L. Rev. 1-36 (1961); Legis., New York Statute Gives Special Treatment to Close Corporations—N.Y. Laws 1961, ch. 855, 75 Harv. L. Rev. 852-856 (1962). Only the North Carolina Business Corporation Act of 1955 comes close to the New York revision in this respect. Delaware is especially unaccommodating to the close corporation. See, e.g., Abercrombie v. Davies, 130 A.2d 338 (Del. Sup. Ct. 1957), reversing 125 A.2d 588 & 123 A.2d 893 (Del. Ch. 1956), on remand, 131 A.2d 822 (Del. Ch. 1957); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947), reversing 29 Del. Ch. 318, 49 A.2d 603 (Ch. 1946).

29. N.Y. Bus. Corp. Law §§ 620(b), 701 (applicable to corporations whose shares are not traded on a national securities exchange or regularly traded in an over-the-counter market by one or more members of a national or affiliated securities association). See also note 35 infra.

30. E.g., N.Y. Bus. Corp. Law §§ 609, 615, 620(a), 709, 715, 716, 1105 (1002, as amended).

31. N.Y. Bus. Corp. Law §§ 620(a), 620(b), 701, 1105 (1002, as amended) (derived from N.C. Gen. Stat. §§ 55-73(a), 55-73(b), 55-34(a), 55-125(a)(3) (Michie Supp. 1959)). See O'Neal, Recent Legislation Affecting Close Corporations, 23 Law & Contemp. Prob. 341 (1958); Latty, The Close Corporation and the North Carolina Business Corporation Act, 34 N.C.L. Rev. 432 (1956).

32. Certificates of incorporation, amendments thereto, certificates of dissolution, etc., unlike by-laws, must be cleared for filing by the Department of State, which has tended to be rather strict-constructionist in the past. See 7 White on New York Corporations ¶¶ 5.11, 5.22, 7.25, 7.602, 7.61, 7.63, 8.16, 8.176, 8.18, 8.181, 8.191, 8.194, 8.195, 10.02 (12th ed. 1953).

33. But see Matter of Burkin (Katz), 1 N.Y.2d 570, 154 N.Y.S.2d 898 (1956); Matter of Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954); Long Park, Inc.

which comprise the vast majority of New York business corporations.[34]

Actually, the new law is even more close-corporation-oriented than described above. Only their shareholders are denied limited liability for wages and "fringe-benefits,"[35] and only they might not be able to evade various regulatory provisions of the new law by out-of-state incorporation.[36]

Application to business corporations of the various noncorporate statutes[37] is, of course, not affected by the Business Corporation Law.[38]

Competent Draftsmanship

The present Stock Corporation Law and General Corporation Law are poorly organized and drafted, and have not been improved by periodic piecemeal amendment. They suffer also from the complexity of being part of the three-tier corporate law structure. Each of the two redounds in ambiguous terms[39] and provisions,[40] excessive verbosity in some areas,[41] and complete silence in various important areas.[42] Considered either alone or as two

v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948); Benintendi v. Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829 (1945); McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934); Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918). Cf. Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936). See Comment, "Shareholder Agreements" and the Statutory Norm, 43 Cornell L.Q. 68 (1957).

34. Approximately one fifth of all current business incorporations occur in New York. Delaware, although the state of incorporation of most large corporations, ranks approximately eleventh (roughly two per cent) with respect to number. Henn on Corporations and Other Business Enterprises, p. 5 (1961). Cf. note 27 supra and note 107 infra.

35. N.Y. Bus. Corp. Law § 630 (such unlimited shareholder liability applicable only to ten largest beneficial shareholders of corporations whose shares are not traded on a national securities exchange or regularly traded in an over-the-counter market by one or more members of a national or an affiliated securities association). See note 29 supra. For criticism of this anachronism, see note 79 infra.

36. See Amendatory Bills (exempting from New York regulatory provisions foreign business corporations whose shares are listed on a national securities exchange). For criticisms of this feature, see notes 83, 108, 115, 116, 135 infra.

37. E.g., N.Y. Aband. Prop. Law; N.Y. Civ. Prac. Act; N.Y. Educ. Law; N.Y. Gen. Bus. Law; N.Y. Penal Law; N.Y. Pers. Prop. Law; N.Y. Real Prop. Law; N.Y. Tax Law. At the present time, some of the new policies of the Business Corporation Law are inconsistent with those of the Penal Law. E.g., N.Y. Penal Law §§ 664, 667.

38. Some provisions in the new law are expressly "subject to . . . any other statute of this state." E.g., N.Y. Bus. Corp. Law § 202(a).

39. E.g., N.Y. Gen. Corp. Law §§ 2, 3 (classification of stock corporation chartered by the regents of the university); N.Y. Stock Corp. Law § 15 (meaning of "insolvency").

40. E.g., N.Y. Stock Corp. Law § 2, N.Y. Gen. Corp. Law § 6 (priority in event of conflict between Stock Corporation Law and General Corporation Law); N.Y. Gen. Corp. Law §§ 27, 28 (requisite vote for board of directors action); N.Y. Stock Corp. Law § 14 (issue of shares to employees); N.Y. Stock Corp. Law § 15 (prohibited transfers to officers, shareholders, directors, or creditors); N.Y. Stock Corp. Law § 69 (consideration for issue of shares and bonds).

41. E.g., N.Y. Gen. Corp. Law §§ 9, 9-a, 9-b, 9-c (corporate names) (quaere, why in the case of a foreign corporation the designation of corporateness must be at the end of the name—N.Y. Bus. Corp. Law § 301(a)(1)); § 18 (prohibition of banking powers); §§ 34, 35 (charitable contributions); §§ 70, 74, 140, 150-192 (corporate receivership); N.Y. Stock Corp. Law § 21 (shareholder appraisal remedy); §§ 35-38 (amendments of certificate of incorporation); §§ 105, 106 (dissolution without judicial proceedings).

42. E.g., executive committees and other committees of board of directors (see N.Y. Bus. Corp. Law § 712); convertible securities (see N.Y. Bus. Corp. Law § 519); share options (see N.Y. Bus. Corp. Law § 505); share distributions (see N.Y. Bus. Corp. Law

complementary statutes they do not offer any logical arrangement.[43]

The new law is rich in definitions. Some thirty definitions are found, seventeen of them in the definitional section;[44] the balance of them in or near the specific provisions to which they primarily relate.[45] Most of the definitions are conventional enough. Some, however, give a broader[46] or narrower[47] connotation than usual, or select one of alternative meanings.[48] Some,[49] but not all,[50] follow the latest fashion. Of the terms which might have been defined but have not,[51] the most singular omission is that of "business corporation."[52] The several definitions should help in the construction of the provisions of the new statute.[53]

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§ 511); fractional shares (see N.Y. Bus. Corp. Law § 509, as amended). Express provisions, by setting forth what is permissible, of course, establish limitations as well.

43. E.g., compare headings of fifteen articles in General Corporation Law and of eleven articles in Stock Corporation Law. See N.Y. Gen. Corp. Law § 61-b (security for expenses). Compare N.Y. Gen. Corp. Law §§ 100-119 (judicial proceedings for voluntary dissolution) with N.Y. Stock Corp. Law §§ 105-106 (dissolution without judicial proceedings). See Israels, Commission and the Corporation Laws, 40 Cornell L.Q. 686 (1955).

44. N.Y. Bus. Corp. Law § 102(a) (Definitions) ("Bonds," "Capital surplus," "Certificate of incorporation," "Corporation" or "domestic corporation," "Director," "Board," "Earned surplus," "Foreign corporation," "Authorized" when used with respect to a foreign corporation, "Insolvent," "Net assets," "Office of a corporation," "Process," "Stated capital," "Surplus," "Treasury shares").

45. N.Y. Bus. Corp. Law § 601(a) ("by-law adopted by the shareholders"), § 618 ("cumulative voting"), § 622(a) ("Preemptive right," "Voting shares," "Voting rights," "Equity shares," "Unlimited dividend rights"), § 630, as amended ("pro rata"), § 702(a) ("entire board"), § 901(b) ("Merger," "Consolidation," "Constituent corporation," "Surviving corporation," "Consolidated corporation"), § 1317(a) ("Domiciled foreign corporation") (see note 109 infra).

46. E.g., "Bonds" as including secured and unsecured bonds, debentures and notes; "Capital surplus" as meaning surplus other than earned surplus.

47. E.g., "Corporation" as meaning domestic corporation.

48. "Insolvency" is defined in the equity rather than bankruptcy sense; "entire board" is defined as "the total number of directors which the corporation would have if there were no vacancies." N.Y. Bus. Corp. Law § 702(a). Here, a more precise term like "authorized board" would have avoided the necessity of definition.

49. E.g., "Stated capital" for "capital" (see N.Y. Stock Corp. Law § 13); "Merger" for a procedure whereby two or more domestic corporations "merge into a single corporation which shall be one of the constituent corporations"; "Consolidation" for a procedure whereby two or more domestic corporations "consolidate into a single corporation which shall be a new corporation to be formed pursuant to the consolidation." N.Y. Bus. Corp. Law § 901 (cf. N.Y. Stock Corp. Law §§ 85, 86). "Shares" for stock and "shareholder" for stockholder, while not defined terms, are in keeping with current fashion. "Procedure to enforce shareholder's right to receive payment for shares" is the name given to the appraisal remedy. N.Y. Bus. Corp. Law § 623.

50. E.g., "Capital surplus," instead of "unearned surplus," as meaning surplus other than earned surplus.

51. E.g., "Cancelled" or "retired" shares; "full voting rights," "unlimited dividend rights" (§ 501(a) as amended). That cancellation or retirement of shares is possible by either elimination from authorized shares or restoration to the status of authorized but unissued shares might have been indicated. See note 53 infra; cf. note 45 supra.

52. See note 24 supra. While the term "business corporation" does not appear in the new law except in the short title provision, the new law is entitled "Business Corporation Law." N.Y. Bus. Corp. Law § 101 (Short title). It reminds one of the play, "Hamlet," without its name character.

53. As should the definitions in the various earlier drafts. See note 122 infra. Definitions in earlier drafts omitted from the new law include those for "Business corporation," "Cancelled shares," "Duly convened meeting of shareholders," "Securities," "Stated value." The First Bill would have prohibited the use of the term "stock dividend" or "share

The new law has attempted to follow modern legislative drafting principles, in wording, sentence structure, paragraphing, etc.[54] It consists of logically arranged and numbered articles and sections.[55] There are fourteen articles:

Article 1. Short title; definitions; application; certificates; miscellaneous (§§ 101-112)
2. Corporate purposes and powers (§§ 201-203)
3. Corporate name and service of process (§§ 301-308)
4. Formation of corporations (§§ 401-404)
5. Corporate finance (§§ 501-520)
6. Shareholders (§§ 601-630)
7. Directors and officers (§§ 701-726)
8. Amendments and changes (§§ 801-808)
9. Merger or consolidation; guarantee; disposition of assets (§§ 901-911)
10. Non-judicial dissolution (§§ 1001-1009)
11. Judicial dissolution (§§ 1101-1117)
12. Receivership (§§ 1201-1218)
13. Foreign corporations (§§ 1301-1320)
14. Effective date (§ 1401).

From the point of view of logical arrangement, the new law is probably as good as, if not better than, any existing American corporate statute.[56]

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dividend" except in conformity with current New York Stock Exchange usage. See note 10 supra.

54. See Third (1959) Interim Report, pp. 147-153. A purist might object to subclassifications into less than two units, or the symmetry of some of the break-downs (cf. §§ 620(a) and 620(b),(c),(d),(e),(f), as amended).

55. Each section number indicates the article in which the section appears. Furthermore, in cross-references to sections, the number of each section is accompanied in parentheses by the title thereof. In contrast, the Model Business Corporation Act contains no cross-references to sections by number on the theory that corrections might be overlooked in case of future amendments. See Preface to 1950 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, p. 101. Cross-references to other statutes are often general in terms. But cf. §§ 201(a)(11), as amended, 1316(e).

56. But see Preface to 1950 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, pp. 100-101:

> The Committee believes that the organization of subject matter in the Model Act is the best that can be devised. There are 145 Sections in the Act. The first 46 Sections are devoted to substantive provisions, such as purposes, powers, corporate name, authorized and issued shares, by-laws, directors, officers, meetings, books and records, and other subjects which should be well understood before procedural steps are undertaken. The next 52 Sections cover procedures for incorporation, amendment, change in capitalization, merger, consolidation, sale of assets, voluntary dissolution, involuntary dissolution, receivership, and liquidation. The next 19 Sections are devoted to the status, admission, withdrawal, and ouster of foreign corporations. Then follow 10 Sections on annual reports, fees, franchise taxes and miscellaneous charges payable to the state. The final 18 Sections cover penalties, administrative authority and miscellaneous matters. In a general way this arrangement has already been adopted in a few states, but in the others there seems to be little, if any, attempt at logical organization. Customarily their statutes begin with incorporation and other procedures and scatter substantive matters here and there throughout the text.

Modernity

The emphasis throughout the revision program has been to give to New York "a modern, workable and sound corporate law structure."[57]

The last general revision of the New York corporate statutes applicable to business corporations occurred almost forty years ago, with the Stock Corporation Law dating from 1923[58] and the General Corporation Law from 1929.[59] In the meantime, some thirty-six American jurisdictions have undertaken general revisions.[60]

Here, the goal was: (a) to retain the best of existing New York law, statutory and decisional; (b) to eliminate anachronisms; and (c) to draw on sound examples in other jurisdictions.

Many existing New York statutory rules have been retained in more or less restated formulation.[61] Some judicial decisions have been more or less codified;[62] others to some extent have been overruled.[63]

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57. Second (1958) Interim Report, p. 9.

58. N.Y. Sess. Laws 1923, ch. 787, amending N.Y. Sess. Laws 1909, ch. 61. Prior to 1923, the so-called Business Corporations Law, as well as the Stock Corporation Law and the General Corporation Law, applied to business corporations. Most of the Business Corporations Law was repealed in 1923 and the vestiges in 1926 and 1952.

59. N.Y. Sess. Laws 1929, ch. 650, amending N.Y. Sess. Laws 1909, ch. 28.

60. Ohio (1927, 1955), Louisiana (1928), Indiana (1929), Idaho (1929), Tennessee (1929), Arkansas (1931), California (1931, 1947), Michigan (1931), Illinois (1933), Minnesota (1933), Pennsylvania (1933), Washington (1933), Kansas (1939), Nebraska (1941), Missouri (1943), Kentucky (1946), Oklahoma (1947), Maryland (1951), Wisconsin (1951), Oregon (1953), Florida (1953), District of Columbia (1954), Texas (1955), North Carolina (1955), Virginia (1956), Puerto Rico (1956), North Dakota (1957), Alaska (1957), Colorado (1958), Iowa (1959), Connecticut (1959), Alabama (1959), Wyoming (1961), Utah (1961), Mississippi (1962), South Carolina (1962). See 1957 Interim Report, p. 30; 1 Model Bus. Corp. Act Ann., pp. 2-3 (1960).

61. E.g., N.Y. Bus. Corp. Law § 202 (general powers—amended to cover expressly emergency by-laws per § 12(17) of State Defense Emergency Act), § 301 (corporate name), § 501 (authorized shares), Article 8 (amendments of certificate of incorporation) (but reducing required shareholder vote from two-thirds to majority). New statutory formulations include provisions relating to defense of ultra vires (§ 203), organization meeting of incorporator(s) (§ 404) (quaere, as to practical necessity of organization meeting of board of directors), removal of directors (§ 706), executive committees and other committees (§ 712), interested directors (§ 713) (quaere, as to validity of any existing certificate of incorporation provision patterned on the one upheld in Everett v. Phillips, 288 N.Y. 227, 43 N.E.2d 18 (1942)), fixing of own consideration by board of directors (§ 713(c)), dual office-holding (§ 715(e)), duty of directors and officers (§ 717).

62. E.g., N.Y. Bus. Corp. Law § 626(e) (Clarke v. Greenberg, 296 N.Y. 146, 71 N.E.2d 443 (1947)); § 723 (Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), aff'd mem., 267 App. Div. 890, 47 N.Y.S.2d 589 (1st Dep't 1954)). Cf. note 63 infra.

63. E.g., N.Y. Bus. Corp. Law § 202(a)(15) (Frieda Popkov Corp. v. Stack, 198 Misc. 826, 103 N.Y.S.2d 507 (Sup. Ct. 1950)); Jemison v. Citizens' Sav. Bk., 122 N.Y. 135, 23 N.E. 264 (1890)); § 203 (Matter of McGraw, 111 N.Y. 66, 19 N.E. 233 (1888)); § 514 (Topken, Loring & Schwartz, Inc. v. Schwartz, 249 N.Y. 206, 163 N.E. 735 (1928)); § 612(b) (Del-Tran Service Co. v. Fifth Ave. Coach Lines, Inc., 14 A.D.2d 349, 220 N.Y.S.2d 549 (1st Dep't 1961)); § 620(b) (Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948)); § 627 (Gordon v. Elliman, 306 N.Y. 456, 119 N.E.2d 331 (1954)); § 706(d) (Matter of Burkin (Katz), 1 N.Y.2d 570, 154 N.Y.S.2d 898 (1956)); § 717 (Kavanaugh v. Commonwealth Trust Co., 223 N.Y. 103, 119 N.E. 237 (1918)); § 723 (Schwarz v. General Aniline Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953)); § 909 (Eisen v. Post, 3 N.Y.2d 518, 169 N.Y.S.2d 15 (1957)); § 1112 (Matter of Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.Y.2d 563 (1954)). Cf. note 62 supra.

Typical of the anachronisms which have been eliminated are the requirement that there be at least three incorporators, that two-thirds of them be United States citizens, that at least one be a New York resident, and that all subscribe to shares;[64] the requirements that the initial directors be named in the certificate of incorporation, that directors be shareholders, and that at least one be a United States citizen and a New York State resident;[65] the limited exceptions permitting shareholder meetings outside the state;[66] the references to closing of the stock books;[67] the lack of general provision for shareholder, subscriber and incorporator action by written consent without a meeting;[68] the too-limited judicial powers respecting elections;[69] the requirement, without exception, that the business of the corporation be managed by its board of directors;[70] the provision, without exception, that officers were appointable and removable by the board of directors;[71] the recognition of "stated value" shares without par value;[72] the requirement that all of the consideration for true shares without par value be allocated to capital;[73] the requirement that all voting trusts be open;[74] the peculiar New York "merger"/"consolidation" terminology.[75]

64. N.Y. Stock Corp. Law § 5; N.Y. Gen. Corp. Law § 7; N.Y. Bus. Corp. Law § 401. These requirements were usually circumvented by the use of dummy or accommodation incorporators. See Note, 47 Cornell L.Q. 443 (1962).

65. N.Y. Stock Corp. Law § 5(8),(10); N.Y. Gen. Corp. Law § 27; N.Y. Bus. Corp. Law §§ 402, 701.

66. N.Y. Stock Corp. Law § 45; N.Y. Bus. Corp. Law § 602(a).

67. N.Y. Stock Corp. Law §§ 47, 62. Cf. N.Y. Bus. Corp. Law § 604.

68. See N.Y. Bus. Corp. Law § 615; cf. N.Y. Stock Corp. Law § 14 (employee share option plan), § 16 (mortgage), § 19 (guarantee), § 20 (sale, lease or exchange of assets), §§ 35-38 (amendment of certificate of incorporation), § 86 (consolidation), § 105 (non-judicial dissolution); N.Y. Gen. Corp. Law § 45 (extension of corporate existence), § 49 (revival of corporate existence).

69. N.Y. Gen. Corp. Law § 25 ("confirm the election or order a new election, as justice may require"); N.Y. Bus. Corp. Law § 619 ("confirm the election, order a new election, or take such other action as justice may require").

70. N.Y. Gen. Corp. Law § 27; N.Y. Bus. Corp. Law § 701 ("Subject to any provision in the certificate of incorporation authorized by paragraph (b) of section 620").

71. N.Y. Stock Corp. Law § 60; N.Y. Bus. Corp. Law §§ 715, 716 (election and removal of all officers or specified officers by shareholders per certificate of incorporation provision).

72. N.Y. Stock Corp. Law § 12(4)(A); cf. N.Y. Bus. Corp. Law §§ 501(a), 504(d), 506(b). Quaere, as to existing certificates of incorporation authorizing "stated value" shares without par value.

73. N.Y. Stock Corp. Law § 13(4)(13); N.Y. Bus. Corp. Law § 506(b) (board of directors allowed 60 days to allocate to capital surplus portion, but not all, of consideration received for shares without par value).

74. N.Y. Stock Corp. Law § 50; N.Y. Bus. Corp. Law § 621.

75. N.Y. Stock Corp. Law § 85 ("merger" used to mean only so-called "short merger" of at least 95 per cent-owned subsidiary into parent corporation where authorized businesses similar or incidental), § 86 ("consolidation" used to include consolidation of two or more corporations "into a single corporation, which may be either a new corporation or any one of the constituent corporations"); N.Y. Bus. Corp. Law § 901 (note 49 supra). Other modern innovations include: Express treatment of treasury shares (§§ 102(a)(14), 504, 505, 511, 515, 517, 612, 622, 623); Express power of corporation to acquire its own shares (§§ 202(a)(14), 513); Express power of corporation to be a partner (§ 202(a)(15)); Implied designation of secretary of state as process agent by unauthorized foreign corporation doing any business in New York (§ 307); Express recognition of certain preincorporation problems (§§ 503 (preincorporation share subscriptions), 504(a), 507 (preincorpora-

Modernization, however, has been less than complete, and not only have some anachronisms been retained but also at least a few have been added.

Anachronisms which have been retained include the requirement that a business corporation be incorporated for specified purposes rather than, when desired, for all lawful business purposes;[76] the ineligibility of a corporation to serve as an incorporator;[77] the requirement that shares of a corporation be represented by share certificates;[78] unlimited shareholder liability for wages and "fringe-benefits" of wage-earners;[79] the requirement that there be a board of directors;[80] the requirement that the board of directors act only at a meeting of the board;[81] and the retention of procedural provisions concerning receiverships.[82]

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tion services)); Elimination of requirement that share certificates set forth statement or summary of designations, relative rights, preferences and limitations of classes of shares (§ 508(b)); Express recognition of insolvency, in addition to surplus test, as limitation on cash or property dividends and repurchase by corporation of its own shares (§§ 510, 513); Accommodation to open-end investment companies ("mutual funds") (§ 512(b)); Recognition of redeemable common shares (§ 512(c)); Express recognition of agreements for purchase by a corporation of its own shares (§ 514); Provision for conferring shareholder inspection and voting rights on bondholders (§ 518(b), as amended—see note 82 infra); Express recognition of shareholder voting agreements (§ 620(a)); Provision enabling shareholders to secure annual and possibly interim balance sheet and profit and loss statement (§ 624(e), as amended); Provision requiring court approval of settlement of shareholder derivative action (§ 626(d)); Express recognition of possibility of individual recovery in shareholder derivative action (§ 626(e)); Elimination of requirement that president be a director (§ 715(a)—cf. N.Y. Stock Corp. Law § 60); Provision for making current list of directors and officers available to shareholders, creditors, or state officials (§ 718).

76. N.Y. Bus. Corp. Law § 201; N.Y. Stock Corp. Law § 5(2). See Assembly Int. 1360, Pr. 1360 (January 5, 1961) (bill to permit certificate of incorporation to specify purposes(s) or to state that the purposes shall be all lawful business purposes or both).

77. N.Y. Bus. Corp. Law § 401 ("one or more natural persons of the age of twenty-one years or over"); N.Y. Gen. Corp. Law § 7 ("natural persons of full age"); N.Y. Stock Corp. Law § 5(10) ("of full age").

78. N.Y. Bus. Corp. Law § 508; N.Y. Stock Corp. Law § 65.

79. N.Y. Bus. Corp. Law § 630; N.Y. Stock Corp. Law § 71. Limited by the new law to ten largest beneficial shareholders or close corporations. These provisions apply only to domestic corporations. Armstrong v. Dyer, 268 N.Y. 671, 198 N.E. 551 (1935). Under the present provision a union has been allowed recovery. Greenberg v. Corwin, 31 Misc. 2d 736, 222 N.Y.S.2d 80 (Sup. Ct. 1961). Although any person to whom the corporation is liable for wages and "fringe-benefits" as defined in § 630(b) is given a statutory right to inspect the *record* of shareholders, quaere, as to how he determines the ten largest *beneficial* shareholders (§ 624(b)).

80. N.Y. Bus. Corp. Law § 701; N.Y. Gen. Corp. Law § 27. But see N.Y. Bus. Corp. Law §§ 707, 620(b). Kessler, The Statutory Requirement of a Board of Directors: A Corporate Anachronism, 27 U. Chi. L. Rev. 696 (1960). Cf. "The new Business Corporation Law was drafted upon the basic philosophy of a strong board of directors." Anderson and Lesher, The New Business Corporation Law, 33 N.Y.S. Bar J. 426 (1961). But see notes 28, 29 supra.

81. N.Y. Bus. Corp. Law § 708; N.Y. Gen. Corp. Law §§ 27, 28. See Note, Extent to which Corporate Directors May Act without a Formal Board Meeting, 11 Syracuse L. Rev. 68 (1959).

82. N.Y. Bus. Corp. Law, art. 12, §§ 1201-1217; N.Y. Gen. Corp. Law §§ 70, 74, 140, 150-192. The revisers of the proposed New York Civil Practice Law and Rules apparently have insisted on this. Of course, even if corporate receivership provisions were to be included in the proposed Civil Practice Law and Rules, a temporary problem would arise concerning business corporations which after the effective date of the Business Corporation Law would no longer be subject to the General Corporation Law, including its receivership provisions. Quaere, as to the effect of the insertion in the new law of procedural provisions implementing shareholder statutory inspection rights in lieu of reliance on the

The new law's principal retrogression is its recognition of the old "concession theory" with respect to the foreign corporation, viz., that it is a creature of the law of its state of incorporation and should, even when doing business in New York with New York residents, be governed, so far as regulatory aspects are concerned, by the law of its state of incorporation and not by New York law.[83]

In drawing on sound examples of provisions in other jurisdictions, the emphasis was on the Model Business Corporation Act, California, Delaware, District of Columbia, Maryland, Massachusetts, North Carolina, Ohio, Pennsylvania, Texas, and Virginia.[84] Since three of these jurisdictions have adopted the Model Act,[85] and two more have very similar provisions in many respects,[86] the debt of the New York revision to the Model Act remains substantial. Second credit is due North Carolina for its close corporation provisions.[87]

Workability

In stressing workability of the new law, two aspects were mentioned: (a) maximum flexibility for internal corporate affairs;[88] and (b) simplified and clarified procedural requirements.[89]

The procedural requirements involve both intracorporate procedures and filing procedures.

The new law expressly deals with practically all conceivable intracorporate procedural matters, often indicating the rule but permitting variation by provision in the certificate of incorporation or by-laws.[90] Full recognition in such respects is given to modern corporate practices.

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provisions in the present Civil Practice Act. N.Y. Bus. Corp. Law § 624(d). Another anachronism is the non-recognition of bearer shares (confirmed by the new requirement that share certificates state the "name of the person or persons to whom issued"—§ 508(c)(2); cf. N.Y. Stock Corp. Law § 65—and complicated by the recognition of possible shareholder rights in holders of bonds, debentures and notes which may be in bearer form—§ 518(b)); cf. N.Y. Pers. Prop. Law §§ 186 to 186-c; Conn. Gen. Stat. Ann. § 33-345(c) (Supp. 1961); Mont. Rev. Codes Ann. §§ 15-608 to 15-613 (1947) (recognizing bearer shares).

83. See note 109 infra.

84. Second (1958) Interim Report, p. 66. Expressly rejected was "a 'paste and scissors' method by adopting provisions of the Model Business Corporation Act enacted in various states." Second (1958) Interim Report, p. 9. But see notes 85, 86 infra. In the Revisers' Notes and Comments to no less than 42 of the then 182 sections of the new law are credits expressly given to the Model Act. The Model Act was intended to "be of benefit to various states in modernizing their business corporation statutes." Preface to 1953 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, p. 112; see Model Business Corporation Act Annotated (3 vols.) (1960).

85. District of Columbia, Texas, Virginia. Other Model Act jurisdictions include Alaska, Colorado, Idaho, Mississippi, North Dakota, Oregon, Utah, Wisconsin, Wyoming.

86. Maryland, North Carolina. Other jurisdictions which have many Model Act provisions include Alabama, Connecticut, Illinois, and South Carolina.

87. See text accompanying notes 28, 31 supra. See also note 109 infra.

88. 1957 Interim Report, p. 50; Third (1959) Interim Report, p. 45. The draftsmen of the Model Business Corporation Act expressly favored flexibility concerning internal corporate affairs. Preface to 1950 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, p. 109.

89. 1957 Interim Report, p. 50; Third (1959) Interim Report, p. 45.

90. See notes 94-96 infra. Besides expressly designating the Secretary of State as

The contents of certificates and filing requirements have been simplified and clarified, with the procedure for various filings made more uniform, the formalities reduced to a minimum, and a series of generic provisions made applicable to all certificates which are to be delivered to the Department of State for filing under the new law.[91]

So far as maximum flexibility for internal corporate affairs is concerned, the certificate of incorporation may set forth any provision, not inconsistent with the new law or any other New York statute, relating to the business of the corporation, its affairs, its rights or powers, or the rights or powers of its shareholders, directors or officers.[92] Subject to the certificate of incorporation, the by-laws may contain any such provision.[93] In addition, many of the provisions of the new law apply "unless otherwise provided" in the certificate of incorporation[94] or by-laws[95] or either.[96] Finally, the certificate of incorpora-

agent for service of process, a domestic corporation or an authorized foreign corporation has under the new law the option of also designating a resident agent for service of process. N.Y. Bus. Corp. Law § 305. Amendatory Bills create possible construction problems and pitfalls by the insertion of words like "specifically" (§§ 616(b), as amended, 709(b), as amended—cf. § 620(d)) and "specific" (§§ 702(a),(b), as amended, 704(a), as amended, 705(b), as amended, 706(a), as amended). The pattern of the new law concerning required legends on share certificates is not consistent: (1) "plainly on the face or back" (§§ 505(e), as amended, 609(h), 616(c), 620(f), as amended, 709(c)); (2) "on the face or back" (§ 1105—now § 1002, as amended); (3) "stating that" (§ 621(a)); (4) no provision (shareholder voting agreement under § 620(a); agreement for purchase by a corporation of its own shares (§ 514)); cf. N.Y. Pers. Prop. Law § 176 ("is stated upon"); Uniform Commercial Code § 8-204 ("noted conspicuously on") (effective Sept. 27, 1964).

91. N.Y. Bus. Corp. Law § 104 (generic provisions), § 303 (application to reserve corporate name), § 402 (certificate of incorporation), §§ 502(d), 805 (certificate of amendment or of change), § 904 (certificate of merger or consolidation), § 1002 (certificate of dissolution), § 1304 (application for authority), § 1309 (certificate of amendment), § 1310 (certificate of surrender of authority). Rejected was the Model Business Corporation Act pattern of delivering duplicate originals of "articles" to the Secretary of State and his filing of one and return of the other appended to a "certificate." No longer in New York will a "certificate of authority" be issued to a qualified foreign corporation. Cf. N.Y. Gen. Corp. Law § 212. Only a majority shareholder vote, instead of two-thirds, is required for even major amendments of the certificate of incorporation, except under N.Y. Bus. Corp. Law §§ 616(b), 620(d), 709(b). See § 803(a). A two-thirds vote is required for mergers and consolidations (§ 903(a)), guarantee not in furtherance of corporate purposes (§ 908), disposition of all or substantially all assets not in usual or regular course of business actually conducted (§ 909(a)), non-judicial dissolution (§ 1001). Shareholder approval is expressly not required for mortgages and pledges (§ 911—cf. N.Y. Stock Corp. Law § 16). By amendment of the certificate of incorporation, corporate existence may be not only extended but even revived (§ 801(b)(6)). The appraisal remedy is substantially retained in the case of various extraordinary corporate matters (§§ 623, 806(b), 909, 910(a), 1004(a)—amended as 1005(a)).

92. N.Y. Bus. Corp. Law § 402(b). See also §§ 202(a), 501(a), 504(d), 505(a), 511(a)(3), 515(a), 518(b), 519(a),(b), 519(d)(2), 601(a), 602(c), 608(b), 612(a), 613, 614, 615(a), 617, 618, 622, 701. 703(a), 704(a), 705(a), 705(b), 706(a), 706(b), 707, 710, 712, 713(a), 715(c), 725(g)(2), 911, 1104. The certificate of incorporation need not set forth any of the powers enumerated in the new law. § 402(b).

93. N.Y. Bus. Corp. Law § 601(b). See also §§ 503(d), 508(d), 601(a), 602(a), 602(b), 602(c), 603(a), 604(a), 605(b), 608(b), 610, 612(g), 701, 702(a), 702(b), 705(a), 705(b), 706(a), 706(b), 707, 710, 711(a), 711(b), 712(a)(5), 713(c), 715(c), 715(g), 725(g)(2).

94. E.g., N.Y. Bus. Corp. Law §§ 202(a), 505(a), 511(a)(3), 612, 622, 701, 707, 911, 1104. See note 95 infra.

95. E.g., N.Y. Bus. Corp. Law §§ 610, 711. Any provision relating to matters which

tion may set forth various far-reaching provisions.[97]

The workability of the new law will have to be determined in the crucible of corporate practice, but the corporate procedural provisions, at least on their face, augur reasonably well in this respect.

Encouragement for New York Incorporations and New York Doing Business by Foreign Corporations

One ever-present strand in the thinking of the Joint Legislative Committee was to "foster New York incorporation of businesses and retention of existing business corporations thereby contributing to economic progress and opportunities for the citizens of our State."[98]

Promotion both of New York incorporation and of doing New York business by foreign corporations obviously is facilitated by a *laissez-faire* attitude toward corporations: the statute must be "enabling"[99] rather than "regulatory"[100] and should not interfere with their "internal affairs."[101]

As mentioned,[102] the new law's procedural requirements are essentially "enabling." The "regulatory" aspects of the new law relate to its corporate finance provisions,[103] the duties and liabilities of directors and officers,[104] and indemnification of litigation expenses of directors and officers.[105] Such matters

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under the new law are required or permitted to be set forth in the by-laws may be set forth in the certificate of incorporation. Id. § 402(b).

96. E.g., N.Y. Bus. Corp. Law §§ 608(b), 705, 706, 707, 710, 715(c). See note 95 supra.

97. N.Y. Bus. Corp. Law §§ 616, 620(b), 709, 715(b), 1105 (now 1002, as amended). In most cases, the existence of such certificate of incorporation provisions should be noted on the share certificate. See note 90 supra.

98. Third (1959) Interim Report, p. 45; Second (1958) Interim Report, p. 43; 1957 Interim Report, p. 50. The Model Business Corporation Act, one of its draftsmen has recognized, "may not appeal to a state that is soliciting corporate business." Preface to 1950 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, p. 109.

99. Or "permissive" or "liberal"! See Preface to 1953 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, p. 111:

> The Act has been prepared as an enabling statute under which a corporation may be organized and continue to exist, controlling its internal affairs and determining its relation with the state of its creation while its existence continues. It is not, and is not intended to be, a statute regulating its business or external affairs. Regulation as such is regarded as the province of other statutes.

See note 125 infra.

100. Or "paternalistic." See Fuld, New York's New Business Corporation Law, 19 N.Y.C.L.A. Bar Bull. 52 (Year End, 1961). See note 99 supra.

101. Preliminary Report of the Association of the Bar of the City of New York Committee on Corporate Law on the New York Business Corporation Law (1961); Report on New York Business Corporation Law, Committee on Corporation Law, NYSBA, 33 N.Y.S. Bar J. (Dec. 1961). See note 106 infra.

102. See text accompanying notes 89-97 supra.

103. N.Y. Bus. Corp. Law, art. 5 (Corporate Finance), §§ 501-520, 1318-1320. See de Capriles, New York Business Corporation Law: Article 5—Corporate Finance, infra, p. 461. See also de Capriles and McAniff, The Financial Provisions of the New (1961) New York Business Corporation Law, 36 N.Y.U.L. Rev. 1239-1273 (1961); Note, Article V of the New York Business Corporation Law: Corporation Finance, 13 Syracuse L. Rev. 93-107 (1961).

104. N.Y. Bus. Corp. Law §§ 713, 717, 719, 720, 1320. See Hoffman, The Status of Shareholders and Directors Under New York's Business Corporation Law: A Comparative View, infra, p. 496.

105. N.Y. Bus. Corp. Law §§ 721-725. See Hoffman, supra note 104 at 569.

of financial concern to corporate creditors and shareholders, arguably, involve more than "internal affairs."[106]

The "regulatory" features of the new law obviously will not encourage New York incorporation unless they are more than counter-balanced by other advantages of New York incorporation or disadvantages of out-of-state incorporation and doing business in New York as a foreign corporation.

Except for close corporations, incorporation under the new law offers few significant advantages that are not available through incorporation in, say, Delaware.[107] Furthermore, incorporating in another jurisdiction and doing business in New York as a foreign corporation, rather than incorporating and doing business in New York as a domestic corporation, offers the possibility of avoiding the new law's regulatory provisions.[108] Finally, even in such a

See Amendatory Bills (following the wholesome approach that the same statutory indemnification standards should apply in the New York courts to domestic business corporations and foreign business corporations doing business in New York).

106. The Model Business Corporation Act § 99 expressly provides that:

> 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 such corporation is organized governing its organization and internal affairs differ from the laws of this State, and nothing in this Act contained shall be construed to authorize this State to regulate the organization or the internal affairs of such corporation.

But cf. § 100:

> A foreign corporation which shall have received a certificate of authority under this Act shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this 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 such certificate of authority is issued; and, except as in this Act otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

See N.Y. Bus. Corp. Law § 1306:

> An authorized foreign corporation shall have such powers as are permitted by the laws of the jurisdiction of its incorporation but no greater powers than those of a domestic corporation formed for the business set forth in the application for authority.

Arguably, the making of corporate dividends and distributions, and reacquisitions of shares, involve "power." For summary of what at least one draftsman of the Model Business Corporation Act thought of as "internal affairs," see Preface to 1950 Revision of Model Business Corporation Act, reprinted in 1957 Interim Report, pp. 108-109.

107. See Henn, Corporations and Other Business Enterprises § 97 (1961); 1961 Digest of the Delaware Corporation Law 4-5 (Corporation Service Company, 1961). Although the Delaware courts have not been tolerant toward the special problems of close corporations (see note 28 supra), the Legislature in 1961 permitted one or two-man board of directors in one or two-shareholder corporations. Del. Code Ann. tit. 8, § 141(b) (Supp. 1961) (now being copied by New York). One other area where the Delaware courts' holdings have been confusing is that of share options. See Beard v. Elster, 160 A.2d 731 (Del. Sup. Ct. 1960); Gottlieb v. Heyden Chemical Corp., 32 Del. Ch. 231, 83 A.2d 595 (Ch. 1951), rev'd, 33 Del. Ch. 82, 90 A.2d 660 (Sup. Ct. 1952), 33 Del. 177, 91 A.2d 57 (Sup. Ct. 1952), 34 Del. Ch. 84, 99 A.2d 507 (Ch. 1953); Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952), petition for rearg. denied, 33 Del. Ch. 174, 91 A.2d 62 (Sup. Ct. 1952), 33 Del. Ch. 395, 94 A.2d 217 (Ch. 1953).

108. Foreign corporations doing business in New York can avoid all regulatory provisions except §§ 623, 626, 627, and 808, unless they are "domiciled foreign corporations" (see note 109 infra), in which case they become subject also to §§ 510, 511(f), 515(d), 516(c), 517(a)(4), 519(f), 520, 719 (except § 719(a)(3)), 720, 721, 722, 723, 724, and 725. See note 105 supra and note 109 infra. The new law expressly "applies to commerce with foreign nations and among the several states, and to corporations formed by or under any act of congress, only to the extent permitted under the constitution and laws of the

case, there is the risk that the foreign corporation's doing too much business in New York will subject it to several of such regulatory features.[109]

By its regulatory approach toward domestic corporations and by its exemption from such regulation of foreign corporations unless they do too much New York business—both novel to New York law—the new law will probably have the perverted effect of encouraging out-of-state incorporation or reincorporation, or merger or consolidation into a foreign corporation, and discouraging New York business by foreign corporations beyond certain points.

United States." N.Y. Bus. Corp. Law § 103(b); Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276 (1961), noted in 47 Cornell L.Q. 300 (1962). Any foreign corporation not authorized to do business in New York "which itself or through an agent does any [*sic*] business" in New York submits itself to the jurisdiction of the courts of [*sic*] New York and is "deemed to have designated the secretary of state as its agent upon whom process against it may be served, in any action or special proceeding arising out of or in connection with the doing of such business." N.Y. Bus. Corp. Law § 307(a). Such implied designation is new to New York law. Section 218 of N.Y. Gen. Corp. Law is changed by N.Y. Bus. Corp. Law § 1312 which disqualifies a foreign corporation doing business in New York without authority from maintaining *any action or special proceeding* in New York instead of only *an action upon any contract made by it in New York* but provides that such disability to sue is cured by subsequent qualification. Comment, Section 1312 of the Business Corporation Law: The Dilemma of Legislative History and Judicial Interpretation, 30 Fordham L. Rev. 331 (1961).

109. See N.Y. Bus. Corp. Law § 1317, defining "domiciled foreign corporation" as a foreign corporation with:

> (1) At least two-thirds of all its outstanding shares, with or without voting rights, are owned, either beneficially or of record, by residents of this state, or
>
> (2) At least two-thirds of all its outstanding shares with voting rights are owned, either beneficially or of record, by residents of this state, or
>
> (3) At least two-thirds of its business income or its investment income is allocable to this state for franchise tax purposes under the tax law.

This definition—a late 1961 session compromise—is completely unworkable. See Note, Corporations: Domestic Regulation of Foreign Corporations: Concept of 'Domiciled Foreign Corporation': New York Business Corporation Law of 1961, 47 Cornell L.Q. 263 (1962). In contradistinction to the New York approach, which used this concept to *exempt* foreign corporations doing business in New York from New York regulatory policies, North Carolina considered, but did not adopt, an analogous concept, to *increase* its regulation over foreign corporations. See Latty, Pseudo-Foreign Corporations, 65 Yale L.J. 137 (1955). California "blue sky" law regulations have followed this precedent. See Western Air Lines, Inc. v. Sobieski, 191 A.C.A. 393, 12 Cal. Rptr. 719 (1961). The Amendatory Bills eliminate the "domiciled foreign corporation" concept. They exempt from most of the New York regulatory provisions a foreign corporation (1) whose shares are listed on a national securities exchange, *or* (2) if less than one half of the total of its business income for the preceding three fiscal years, or such portion thereof as the foreign corporation was in existence, was allocable to New York for franchise tax purposes under the New York Tax Law. For all but foreign close corporations, this provides a ready loophole since listing on all exchanges but the New York Stock Exchange—assuming sufficient shares and shareholders, etc.—is easy and subjects the listed company to no more than certain minimal regulations by the Securities and Exchange Commission under the Securities Exchange Act of 1934. There are eighteen national securities exchanges, of which four are exempted. In value of share transactions, the New York Stock Exchange accounts for 87 per cent, the American Stock Exchange for 11 per cent, and the sixteen others combine for but 2 per cent. No exchange other than the New York Stock Exchange attempts much regulation, and the exactions of the New York Stock Exchange have little, if any, relationship, to the regulatory provisions of the new law. See N.Y.S.E.—Company Manual; Henn, Corporations and Other Business Enterprises § 316 (1961). Delaware corporations comprise some one third (compared to some 15 per cent for New York corporations) of companies listed on the New York Stock Exchange. See also N.Y. Bus. Corp. Law § 1316(e), as amended ("foreign corporation which has an office in this state for the doing of business and either the principal business operation of which is conducted within this state or the greater part of its property is located within this state").

Soundness—Balancing of Interests

The sound balancing of interests in a corporate statute is the only true test of its worth. And here, of course, "opinions may differ as to the wisdom of particular changes made,"[110] and evaluation is entirely subjective, dependent upon the evaluator's background and experience, his freedom from particular interests, and his critical attitudes.

Obviously, the new law, as compared to present law, creates a new and different balancing of interests. In final analysis, the new law's corporate finance provisions are far more detailed and regulatory.[111] So are the indemnification provisions[112] if one assumes that corporate personnel may now be lawfully indemnified even where they have breached their duty to the corporation so long as they have not been formally adjudged to have done so.[113] As mentioned,[114] the corporate finance provisions do not apply to many foreign corporations; so far as these exempted foreign corporations are concerned, regulation has been decreased.[115] However, as to non-exempted foreign corporations, regulation has become more intense.[116]

With respect to the duty of directors and officers, the standard has been

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110. Governor's Memorandum of Approval. See Latty, Some General Observations on the New Business Corporation Law of New York, infra, p. 591. Compare new policy prohibiting loans to directors without disinterested shareholder approval (N.Y. Bus. Corp. Law § 714) with present policy prohibiting loans to shareholders (N.Y. Stock Corp. Law § 59).

111. Compare N.Y. Bus. Corp. Law §§ 501-520, with N.Y. Stock Corp. Law §§ 11-19, 27-29, 58, 59, 61, 70-73, 114. N.Y. Penal Law §§ 664 and 667 remain the same. See note 37 supra. The new law, with one exception, prohibits the issuance of share certificates until shares have been fully-paid but apparently does not prohibit the issuance of partly-paid shares. N.Y. Bus. Corp. Law § 504(h); cf. N.Y. Stock Corp. Law § 74 (partly-paid shares).

112. N.Y. Bus. Corp. Law §§ 202(a)(10), as amended, 721-725 (exclusive statutory indemnification provisions with respect to directors and officers but not applicable to other corporate personnel). Cf. N.Y. Gen. Corp. Law §§ 63-68. The Amendatory Bills restate §§ 721-725. However, the same principles would, by the Amendatory Bills, apply in the New York courts to foreign as well as domestic business corporations, which is an improvement over the Third Bill. One might question retaining the policy of indemnifying corporate directors and officers who may have breached their duty to the corporation but have not been so *adjudged* for technical or other reasons, e.g., statute of limitations, failure to post required security for expenses. See Henn, Corporations and Other Business Enterprises § 383 (1961). Interested directors as directors (so long as they are not "parties" in the action or proceeding) or as shareholders may vote in favor of indemnification.

113. Absent statute, the test presumably is whether or not the corporate director, officer, etc., has violated his duty to the corporation. When statutes read in terms of not having been *adjudged* to have violated his duty, indemnification possibilities are expanded. See note 112 supra. Where there is an adjudication in favor of the director or officer, or otherwise, indemnification based thereon seems reasonable. Otherwise, indemnification should be allowed those who have not violated their duty to the corporation and not otherwise. The indemnification provisions are somewhat redundant with respect to standards. Cf. §§ 717, 722, 723.

114. See text accompanying notes 105, 108-109, 112 supra.

115. E.g., dividends (cash, property, or share), repurchase by corporation of its own shares, loans to directors, liquidation distributions.

116. See notes 108-109 supra.

relaxed.[117] The liabilities of directors and officers, in some respects, also have been reduced.[118] Immunization by majority shareholder ratification, even when not disinterested, has been recognized.[119] In short, business ethics will not necessarily be elevated by the new law.

Comparison of the balancing of interests under present law and under the new law, of course, provides no test of the soundness of the new law, but it does underscore the new law's somewhat paradoxical philosophies. These are best explained in the light of the developments leading up to the enactment of the new law.

During the first several years of the revision program, the consultants and draftsman were all essentially disinterested academic corporation lawyers with varying degrees of practice in the field. Each was primarily responsible for the particular article or articles assigned to him, and each naturally injected his own philosophies into his draftsmanship.

The results were drafts of bills which certainly represented no particular interests, but which may have been somewhat fragmentized and ivory-towered in approach. Meanwhile, corporate law committees and sub-committees of various bar associations, especially those of the New York State Bar Association and the Association of the Bar of the City of New York alone and in combination, with varying degrees of liaison with the Committee, consultants,

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117. N.Y. Bus. Corp. Law § 717 (from the standard of care that "men prompted by self interest generally exercise in their own affairs" to that degree of care which "ordinarily prudent men would exercise under similar circumstances in like positions." Revisers' Notes and Comments). See also defense of reliance upon financial statements (§ 717) and, so far as statutory liabilities are concerned, defense of formal dissent (§ 719(b)). See note 135 infra. A contract or other transaction involving an interested director apparently need not be "fair and reasonable as to the corporation" if approved by shareholders or disinterested directors. (§ 713, as amended).

118. N.Y. Bus. Corp. Law §§ 719, 720, 1318. Cf. N.Y. Stock Corp. Law §§ 15, 58, 59, 61, 114; N.Y. Gen. Corp. Law §§ 60, 61. Several sections of the new law deal with shareholder derivative actions, defining them as an action "brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares" (§ 626(a)) (quaere, as to shareholder action to enjoin breach of duty to corporation). The plaintiff is required to be such a holder "at the time of bringing the action [quaere, if he ceases to be while the action is pending] . . . and at the time of the transaction of which complains, or . . ." (§ 626(b)). Demand on the board of directors but not on the shareholders is an express condition precedent to suit. (§ 626(c); Note, Corporations: Shareholder Derivative Suits: Requirement of Demand on Shareholders: When Is Shareholder Demand Necessary: Effect of Shareholder Response, 47 Cornell L.Q. 84, 86 n.10 (1961)). Court approval of the settlement of any such action is required (§ 626(d)—quaere, as to settlement of threatened actions). New also is the express provision authorizing the court to award to a successful plaintiff or claimant his reasonable expenses and to direct him to account to the corporation for the remainder of any proceeds received by him (626(e), as amended). By express provision, the appraisal remedy section does not exclude the right of a dissenting shareholder to bring or maintain an appropriate action "to obtain relief on the ground that such corporate action will be or is illegal or fraudulent as to him." (§ 623(k)).

119. N.Y. Bus. Corp. Law §§ 626(c), 713(a)(2), 722(a)(2), 723(a)(1)(B), 725(b)(2) (see notes 112, 117 supra). But cf. § 714. See also Amendatory Bills (eliminating provisions that shares of interested directors may not be counted).

and draftsmen,[120] were reviewing the drafts.[121]

Three bills were actually introduced in the Legislature,[122] the first of which was introduced only in the Senate for study purposes only.[123]

The second bill was prefiled in both Senate and Assembly as of January 4, 1961.[124] It represented the best disinterested thinking on the part of the Joint Legislative Committee as of that time.

On January 27, 1961, a "panel discussion" on "The Proposed New Business Corporation Law for New York State" was scheduled in connection with the annual meeting of the New York State Bar Association in New York City. Instead of following the announced program, most of the session involved the presentation and distribution of an attack on the bill, and the organization of a "march on Albany" for the January 31, 1961 public hearing.[125]

At the last public hearing on the second bill, in Albany on January 31, 1961,[126] strong opposition to the bill was voiced.[127] The result was closer collaboration between the Joint Legislative Committee and the two principal

120. The bar groups complained that the procedures adopted did not provide "an adequate opportunity for exchanges of views between members of the practicing bar and the revisers' staff." See Joint Report of New York State Bar Association Committee on Corporation Law and the Association of the Bar of the City of New York Committee on Corporate Law and Proposed New York Business Corporation Law 1961 Senate Int. 522, Assembly Int. 855 (Jan. 25, 1961), p. 1.

121. Ibid.

122. Omitting Senate Int. 3446, Pr. 3636 (Feb. 19, 1957) (1953, 1957 version of Model Business Corporation Act, introduced for study purposes only in order to have it available for review and comment); Senate Int. 3124, Pr. 3316 (Feb. 15, 1960) [First Bill], Senate Int. 522, Pr. 522, Assembly Int. 855, Pr. 855 (Jan. 4, 1961) [Second Bill]; Senate Int. 533, Pr. 4061, Assembly Int. 855, Pr. 5310 (Mar. 6, 1961) [Third Bill].

123. Senate Int. 3124, Pr. 3316 (Feb. 15, 1960) [First Bill]. For Revisers' Notes and Comments thereto, see Supplement to Fourth (1960) Interim Report, pp. 4-83. See also Rohrlich, New York's Proposed Business Corporation Law, 15 Record of N.Y.C.B.A. 309-323 (1960). See note 121 supra.

124. Senate Int. 522, Pr. 522, Assembly Int. 855, Pr. 855 (Jan. 4, 1961) [Second Bill]. For Revisers' Notes and Comments thereto, see Supplement to Fifth (1961) Interim Report, pp. 7-80.

125. 3 State Bar Newsletter of the New York State Bar Association (Annual Meeting Issue, Jan. 1961); Joint Report of New York State Bar Association Committee on Corporation Law and The Association of the Bar of the City of New York Committee on Corporate Law on Proposed New York Business Corporation Law 1961 Senate Int. 522, Assembly Int. 855 (January 25, 1961) (35 pp.).

126. Previous public hearings had been held on Feb. 13, 1959 (New York City), Oct. 15, 1959 (New York City), Nov. 24, 1959 (New York City), May 13, 1960 (New York City), June 10, 1960 (Albany, N.Y.), June 24, 1960 (Binghamton, N.Y.), Sept. 15, 1960 (Buffalo, N.Y.), October 7, 1960 (New York City). A public hearing was also held in Albany on February 14, 1962.

127. "The topics of the comments included payments of dividends, disclosure, liability and indemnification of directors, liability of shareholders for unpaid wages, regulation of foreign corporations, actions by foreign corporations, shareholders' actions, claims against dissolved corporations, transactions with interested directors and the basic concept of the statute as 'enabling' or 'regulatory' legislation. The Bar Committees promised to submit further specific recommendations for particular amendments which, it was hoped, would remove that opposition to the prefiled bill as a whole." Fifth (1961) Interim Report, p. 41. The Vice-Chairman of the Committee is reported to have declared that he was shocked at the extent of the revisions being proposed at what the committee had expected to be its last meeting. He suggested that it would be possible to enact the bill then in its present form and meet the objections with amendments in the next two years since the bill's effective date was April 1, 1963. (N.Y. Times, Feb. 1, 1961, p. 53, col. 3).

bar groups. In fact, from then on, the bar groups handled the private printing of the several proofs of the bill,[128] and a bar association member continued to participate as a "consultant on draftsmanship."[129] The result was a third bill[130] which was enacted unanimously in the final sessions of the 1961 legislative session. It involved substantial revisions from the second bill a few months before, as witness the opposition of the bar groups to the second bill and their withdrawal of objection to the third bill.[131]

This factual background—all part of the public record—is essential to understanding the philosophies of the new law. They are highlighted by the revisions made in the second bill by the third bill which became law.[132] As this article is being written, further revisions are being made.[133]

Conclusion

In the intervening period between now and when the new Business Corporation Law becomes effective,[134] it should be carefully reviewed by disin-

128. Special Print of Proposed New York Business Corporation law for New York State Bar Association Committee on Corporation Law and the Association of the Bar of the City of New York Committee on Corporate Law (Senate Int. 522; Assembly Int. 855 —As Amended March 6, 1961) (Proof of March 6, 1961).

129. The Joint Legislative Committee acknowledged "the assistance in the preparation of the final draft of the proposed Business Corporation Law, of Jule E. Stocker, Associate Counsel, Equitable Life Assurance Society of the United States. The courtesy of Warner H. Mandel, Vice-President and General Solicitor of the Society, in making this possible is appreciated." Fifth (1961) Interim Report, p. 8. See Report of Committee on Corporate Law, Association of the Bar of the City of New York, 16 Record of N.Y.C.B.A. 16 (Supp. Oct. 1961):

> It is worthy of comment, though not properly a part of the work of the Committee as such, that one member of our Association has made a very important contribution to the improvement of the new law. I refer to Jule E. Stocker, whose services as a consultant on draftsmanship were made available to the Joint Legislative Committee by his employer, The Equitable Life Assurance Society of America. Although not a member of this Committee, Mr. Stocker worked closely with us in the presentation of our views and in drafting the changes which resulted from that presentation. In addition, he reviewed the entire Bill for clarity and consistency and the text has been substantially improved by his efforts.

130. Senate Int. 522, Pr. 4061, Assembly Int. 855, Pr. 5310 (Mar. 6, 1961) [Third Bill]. For Revisers' Notes and Comments thereto, see Revised Supplement to Fifth (1961) Interim Report, pp. 7-82 (available several months after adjournment of Legislature).

131. "As a result of the combined efforts of the State and City Bar Association Committees, a number of important substantive and drafting changes were made in the Bill as originally filed and these were embodied in a substitute Bill. Thereafter, the State and City Bar Association Committees met in joint session and voted by substantial majority of each committee to withdraw the stated opposition to passage of the Bill, while continuing to reiterate the need for further changes before the new law becomes effective. . . ." Report of Committee on Corporate Law Association of the Bar of the City of New York, 16 Record of N.Y.C.B.A. 15-16 (Supp. Oct. 1961).

132. See note 128 supra.

133. Amendatory Bills. Drafts of the Amendatory Bills were not distributed generally among all the advisory subcommittees. See Report on New York Business Corporation Law, Committee on Corporation Law, NYSBA, 33 N.Y.S. Bar J. 435 (Dec. 1961); Preliminary Report of the Association of the Bar of the City of New York Committee on Corporate Law on the New York Business Corporation Law (1961); Recommended Changes in the New York Business Corporation Law by Special Committee on Corporation Law, New York County Lawyers' Association (Nov. 13, 1961).

134. See note 23 supra.

terested groups to be sure that it promotes both the business economy of New York and the business ethics of New York. Whatever regulation is imposed should be buttressed by meaningful sanctions. And whatever policies are worth having at all should apply to business corporations doing business in New York whether they are incorporated in New York or elsewhere.[135]

135. For example, shareholder ratification, to the extent that shareholders are interested, should not be recognized (see note 119 supra); directors who never "learn" of unlawful board of directors action should not be allowed to evade liability (N.Y. Bus. Corp. Law § 719(b)); the notification provisions with their irritant effect but possibly not very meaningful sanctions should be eliminated (N.Y. Bus. Corp. Law §§ 510(c), 511(f),(g), 515(d), 516(c), 517(a)(4), 519(f), 520, 1317, as amended, 1318, as amended), especially in view of the amendment of § 624(e) enabling shareholders upon request to secure annual and possibly interim balance sheet and profit and loss statement); foreign corporations should not be given preferential treatment over New York corporations. See note 109 supra.