The Proposed Michigan Business Corporation Act

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I. INTRODUCTION

When passed forty years ago, Michigan’s General Corporation Act\(^1\) was a forward-looking act, pioneering in several respects.\(^2\) In the ensuing years, as use of the corporate form increased, attempts to mold its structure to the needs of particular enterprises produced substantial litigation and statutory developments in many states.\(^3\) Some of these developments led to amendments to the Michigan Act,\(^4\) but many did not. The result is that in 1971, Michigan’s General Corporation Act is a confused, heavily amended and archaic statute that is now largely unsuited to the needs of Michigan corporations. Several major Michigan corporations have recently reincorporated in other states—primarily Delaware—with the avowed purpose of avoiding the confusing and restrictive provisions of the Michigan Act.\(^5\)

Early in 1968, at the request of the Private Corporations Committee of the House and the Senate Corporations Committee, the Michigan Law Revision Commission began the drafting of a new

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\(^2\) In that day, years before “close corporations” became a major concern of lawyers and statute draftsmen, Michigan had already eliminated the requirement of three incorporators (Mich. Comp. Laws § 450.3 (1967)), had specifically permitted high quorum and vote requirement in the articles of incorporation (Mich. Comp. Laws § 450.32 (1967)), and had made provision for voting trusts (Mich. Comp. Laws § 450.34 (1967)).

\(^3\) Nearly every close-corporation control device came under judicial scrutiny. See, e.g., Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945) (unanimous vote requirements); Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup Ct. 1947) (voting pools); Abercrombie v. Davies, 36 Del. Ch. 371, 130 A.2d 338 (Sup. Ct. 1957) (control agreements); Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936) (agreements limiting director discretion). One of the earliest decisions upholding a broad control agreement in the absence of special statutory provision was Galler v. Galler, 32 Ill.2d 16, 203 N.E.2d 577 (1964). The court in that decision specifically took note of the particular characteristics of close corporations that simultaneously make such agreements both necessary and not violative of public policy. Subsequent statutory revision in many states clarified and expanded upon the Galler development; see text accompanying notes 23-34 infra.


\(^5\) E.g., Hoover Ball & Bearing Company (to Delaware in 1968), Clark Equipment Company (to Delaware in 1968).
Business Corporation Act. The efforts of the Commission were limited to the sections of the General Corporation Act related to business corporations.

The author of this article was selected by the Commission as Reporter, to draft and revise the statute. It is the purpose of this article to describe the drafting process, to outline the general structure and to examine some unique aspects of the proposed Michigan Business Corporation Act. In this discussion, the author expresses his own views only, and does not necessarily reflect the opinions of the Law Revision Commission or its members.

II. THE PROCESS OF DRAFTING

Within the last fifteen years, the corporation laws of virtually all of the major commercial states—and indeed, a majority of all the states—have been rewritten. Among the more important commercial states to completely rewrite or substantially revise their corporation acts are New York, New Jersey and Delaware. Moreover, a number of states of relatively lesser commercial importance have recently enacted new and unusual corporation provisions. Much of the impetus for this effort has come—in addition to business need—from the Model Business Corporation Act, which itself has been revised recently. Although the tally is confused by departure from the language of the Model Act, some twenty states now have corporation codes substantially in conformity with the Model Act.

In nearly every case, the thrust of revision efforts has been to "liberalize" the corporation statute: to make it permissive and to
avoid as many restrictive rules as state policy will allow.\textsuperscript{14} Indeed, in a kind of perverse development of the "state laboratories" notion of federalism, the states began in the early part of this century to vie with each other for corporate domiciliaries by progressively eliminating all state control over corporations.\textsuperscript{15} This competition is not over, as demonstrated by the Report of the Corporation Law Revision Commission of New Jersey:\textsuperscript{16}

The modern corporation's business is frequently national or international in scope; its state of incorporation is largely incidental. Recognizing this fact, and seeking to attract corporations to establish their domiciles within their borders, most states in recent decades have been increasingly flexible and permissive in revising their corporation laws.

Pursuing this policy perhaps further than any other state, the Commission believes it is following sound public policy for New Jersey. It is clear the the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts.... Any attempts to provide such regulations in the public interest through state incorporation acts and similar legislation would only drive corporations out of the state to more hospitable jurisdictions.

One can hardly take issue with this statement today. Protections formerly afforded by state law are now provided generally by more effective federal legislation.\textsuperscript{17} Restrictive state statutes do cause an exodus of corporations, as Michigan's recent experience amply demonstrates. It is at least arguable, however, that the cumulative effect of state "liberalization" has been to cause an undesirable but necessary increase in federal scrutiny of internal affairs of corporations. In addition, there may be questions as to whether particular forms of "liberalization" do not overly favor corporate autonomy at the expense of legitimate interests that need protection. If either of these points be valid, one may decry the recent trend to liberalization. But few states, barring unusual circumstances\textsuperscript{18} may with impunity—and success—buck the trend.

So it is that Michigan now revises its Business Corporation

\textsuperscript{14} A conspicuous exception to this trend is California, which, unlike most other states, rigidly enforces its restrictive statute. It has proved successful in its efforts, as well. See Western Airlines v. Sobieski, 12 Cal. Rptr. 719 (1961).
\textsuperscript{16} June 20, 1968.
\textsuperscript{17} In particular, the Securities Act of 1933 and the Securities Exchange Act of 1934.
\textsuperscript{18} E.g., California, supra note 14.
Act, and does so, for the most part, in the most liberal tradition of corporation law revision. The revision has been considerably more complex than those in states adopting, with little or no change, the Model Business Corporation Act. The strongest argument for the Model Act is its wide adoption, and for this reason, much of the Model Act language is included in the proposed revision. However, even as revised in 1969, the Model Act is neither complete nor current in a number of critical areas, and the Model Act’s organization is not as effective as several more recent enactments.

The states that have embarked on revisions beyond the Model Act format have spent considerable time and money in the process. The New York Business Corporation Law was enacted in 1961 after five years of study costing several million dollars. New Jersey’s commission reported its conclusions after a decade of work and 176 formal meetings. Delaware’s statute, which is not a new law, but rather an extensive revision with additions, took four years of effort by the Corporation Revision Commission. With these revisions completed, the Michigan Law Revision Commission was able, within the relatively short period of two and a half years, and at relatively small expense, to prepare a statute reflecting studies from several perspectives. Indeed, a fair number of sections are adopted verbatim—or with only minor changes—from recently revised statutes, with the virtues of a degree of interstate uniformity and the ability to use desirable court interpretations of specific language. Despite this, the proposed Act has its own distinct philosophy, reflected in the discussion below.

The actual process of revision consisted of the preparation by the Reporter of initial drafts of each chapter of the proposed Act. These were reviewed in detail with the Commission Chairman and examined by the Commission members. The resulting substantially revised fully annotated drafts were distributed, in two installments, to all concerned members of the Bar and the State Government. Extensive comments were received, and again the drafts were revised, following joint meetings with the Bar, the Commission, the Reporter, and interested state officials. The

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19 One of the most important areas in which the Model Act has failed to reflect a more innovative trend deals with close corporations.
20 REPORT OF THE CORPORATION LAW REVISION COMMISSION OF NEW JERSEY (June 20, 1968).
21 Mr. Cyril Moscow, of the Detroit Bar, helped the Commission greatly in the detailed review process.
22 The comments were received primarily from the Michigan State Bar Association Subcommittee chaired by Melbourne Miller of the Detroit Bar.
Revised and Annotated Michigan Business Corporation Act was submitted as part of the Law Revision Commission’s 1970 report to the Legislature.

III. AN OUTLINE OF THE ACT

A. Close Corporations

The Act is organized chronologically, similarly to the New York and New Jersey acts. It consists of eleven chapters and a repealer.23 Early in the revision effort, the draftsmen were presented with an organizational question with substantive overtones: whether to draft a separate act or chapter containing provisions applicable to close corporations. That special provisions were necessary for close corporations was obvious: it was one of the motivating reasons for the revision. The separate law or chapter approach has been followed in Florida,24 Delaware25 and Maryland.26 By contrast, three-quarters of the remaining jurisdictions have special provisions for close corporations, but no separate statute.

A major problem of close corporation legislation is the definitional consideration of which corporations shall be permitted to make use of the special code sections. The problem becomes particularly perplexing if the draftsman attempts to apply the same standard of applicability to all of the special sections, as must be the case if close corporations are the subject of a separate law or subchapter. Thus, Florida defines a close corporation as “a corporation for profit whose shares of stock are not generally traded in the markets maintained by securities dealers or brokers,”27 and permits any such corporation to elect treatment under the special provisions. However, it is not altogether clear that all of the special provisions should turn on this one criterion;

23 Ch. 1. Title, Definitions and Miscellaneous Procedural Provisions.
Ch. 2. Formation of Corporations, Corporate Name, and Service of Process.
Ch. 3. Corporate Purposes and Powers.
Ch. 4. Capital Structure and Corporate Finance.
Ch. 5. Shareholders.
Ch. 6. Directors and Officers.
Ch. 7. Amendments.
Ch. 8. Corporate Combinations and Dispositions.
Ch. 9. Dissolution.
Ch. 10. Reports.
Ch. 11. Foreign Corporations.
Ch. 12. Repealer.
27 FLA. STAT. ANN. § 608.70(2) (1963)
provisions for dissolution or provisional directors in the event of deadlock, for example, might have value for publicly-traded corporations. By contrast, New York applies the publicly-traded test only to determine the validity of restrictive shareholder agreements.\textsuperscript{28}

A second approach to defining close corporation status is presented in the recent revisions of the Maryland and Delaware corporation codes, both of which include separate subchapters for close corporations. Under these statutes close corporation status is achieved by election plus qualification, which includes a numerical and a public-traded standard.\textsuperscript{29} Action that might cause disqualification as a close-corporation, rather than automatically voiding such status, triggers a remedy on the part of shareholders to void the action.\textsuperscript{30} Although this approach avoids the major objection to the Florida statute—that a single transaction constituting public trading (an ill-defined concept) would void agreements and understandings and alter completely the relationships of the shareholders—it does not avoid the more important objection to separate close corporation legislation: that it attempts, generally unsuccessfully, to apply the same standard for application to diverse code sections of inherently varying applicability.

Accordingly, a section by section approach to close corporations, similar to New York's, was followed in the revision. No code provision defines close corporations. Instead, to fall within a particular provision, the corporation must meet its specific requirements. For example, simple voting agreements are valid without any limitations,\textsuperscript{31} whereas agreements restricting the discretion of directors must be unanimous, and become invalid if shares are publicly traded.\textsuperscript{32} By contrast, a provision for dissolution at the option of a stated percentage of shareholders or on the happening of a specified event may be written into the articles of incorporation by simple majority vote.\textsuperscript{33}

\textsuperscript{28} N.Y. BUS. CORP. LAW § 620(c) (McKinney Supp. 1970).

\textsuperscript{29} An early commentator proposed a test based on number of shareholders (no more than 10) and lack of public trading. Winer, \textit{Proposing a New York "Close Corporation" Law}, 28 CORN. L.Q. 313, 315 (1943). At least one recent commentator supports such a quantitative standard to provide definitional clarity and uniformity. Bradley, \textit{Toward a More Perfect Close Corporation: The Need for More and Improved Legislation}, 54 GEO. L.J. 1145, 1190 (1966).

\textsuperscript{30} \textit{E.g.}, DEL. CODE ANN. tit. 8, § 348(b) (Supp. 1968) vests the Court of Chancery with jurisdiction to enjoin any action which would threaten close corporation status, on the complaint of any shareholder. Maryland has similar provisions.


\textsuperscript{32} \textit{Id.} § 514(b) - (c).

\textsuperscript{33} \textit{Id.} § 904. Other sections with specific requirements are: § 415(c), corporation may provide shares redeemable at option of shareholder (by provision in articles, by unanimous
The philosophy of the Act is broadly permissive, in accord with other recent revisions. Throughout, strictures on operations and structure that do not protect any legitimate and necessarily protected interest are eliminated. Often, in their place are substituted less onerous but more meaningful protections. In several instances, where a general practice has emerged, its validity has been specifically recognized.

B. Filing and Organizational Formalities

In the interests of manageable length, comments here will be limited to those parts of the proposed Act that represent new or unusual developments. The proposed Act includes probably the most simple and uniform filing and documentation procedures in the nation. All required filings fall within the provisions of section 106: a single copy of the document, signed by one corporate official, and without seal or attestation, together with the required fees, is filed with the Administrator. The Administrator returns a true copy showing the filing date. The document becomes effective at the time of filing, unless a subsequent effective date (up to ninety days after filing) is specified therein. This procedure is derived from provisions of the new Connecticut and New Jersey acts.

Organizational formalities are also greatly simplified. Section 202 permits use of the "all purposes" clause in the articles of incorporation, avoiding the need for lengthy, inclusive statements of purposes in the articles. This type of provision—which also allows a corporation specifically to exclude certain purposes if it so desires—is gaining increasing acceptance. In common with other recent statutes, and indeed with the earlier General Corporation Act, section 201 of the proposed Act allows incorporation by one person. The incorporators may designate the

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34 E.g., sale of assets merger.
35 Under the Act, administration is transferred back to the Department of Commerce.
initial board of directors either before or after the filing of the articles, under a procedure similar to—but more flexible than—Delaware's.\textsuperscript{40}

\textbf{C. Capital Structure and Dividends}

Capital structure and dividend treatment are also simplified, yielding a more rational statute. Early cases and commentators assumed that the capital of a corporation constitutes a "trust fund" for the protection of creditors, and that the establishment and maintenance intact of this fund was the \textit{quid pro quo} for the law's grant of limited liability to the owners of the enterprise.\textsuperscript{41}

This notion may have had validity as recently as the early years of this century, but it is surely of dubious merit today. Though the capital of a corporation may be a last resort of creditors, it is only in the event of insolvency (inability to pay debts as they come due) that this protection assumes importance. The protection of creditors is primarily in the corporation's earnings, which provide the ability to pay debt service.\textsuperscript{42} A statute that attempts, as many do, to provide further asset protection to creditors than a prohibition of corporate activity which would render the corporation insolvent flies in the face of practice and unnecessarily limits corporate action. Moreover, statutes such as the Model Act\textsuperscript{43} which attempt to provide protection by limiting dividends to earned surplus usually leave open other outlets by which dividends may be paid up to the point of insolvency.\textsuperscript{44} The Reporter and the Commission were strongly of the view that no genuine protection of creditors was inherent in such a statutory structure, and that it was preferable to treat corporations as other debtors, allowing them to make distributions provided such distributions did not create or threaten insolvency. The same philosophy underlies the Act's provisions on capital structure.

The Act provides that dividends may generally be paid out of any surplus, provided the corporation is not insolvent or would not thereby be rendered insolvent.\textsuperscript{45} This structure is derived

\textsuperscript{40} Proposed Mich. Bus. Corp. Act § 204. Compare Del. Code Ann. tit. 8, § 107 (Supp. 1968), which provides that the naming may precede the filing, but which requires then that the first board be named \textit{in} the articles.

\textsuperscript{41} See, e.g., Scovill v. Thayer, 105 U.S. 143 (1881) (a watered stock case).


\textsuperscript{43} MBCA § 45.

\textsuperscript{44} E.g., MBCA § 46 (capital surplus dividends by vote of shareholders); MBCA § 69 (reduction of capital by vote of shareholders).

from the New York\textsuperscript{46} and Delaware\textsuperscript{47} statutes, except that the "wasting asset" provisions of these statutes, as well as Delaware's "nimble dividend" provisions, have been deleted. The "wasting asset" exception, widely enacted, is designed to allow corporations in the extractive industries to make distributions in excess of surplus to the extent of provisions for depletion. The same result may be achieved by reducing the corporation's stated capital.\textsuperscript{48} The doctrine, moreover, has come under recent criticism as being ill-suited to its purposes.\textsuperscript{49} Nimble dividends, similarly, are paid at a time when there is no accumulated surplus, but when there is a record of earnings for the year in which they are paid. As a matter of policy, such dividends are questionable since they also can be adequately provided for by reduction of stated capital, unless the prohibition against insolvency would be violated.

A matter unclear under most dividend provisions is whether "surplus" is produced by increases in the value of assets without sale thereof (so-called "unrealized appreciation"). This issue was favorably resolved in the leading New York decision of \textit{Randall v. Bailey},\textsuperscript{50} and resolved negatively, based upon some statutory guidance, in Pennsylvania.\textsuperscript{51} New York's revisers claimed to have adopted the \textit{Randall v. Bailey} rule, but nothing in the language of the statute specifically supports that conclusion. The proposed Michigan Act adopts a carefully limited \textit{Randall v. Bailey} approach by defining "total assets," which enter into the surplus calculation, as follows:

\begin{quote}
Total assets means the total of those properties and rights entered upon the books of the corporation in accordance with generally accepted accounting principles, or the current fair market value of such properties and rights of the corporation.\textsuperscript{52}
\end{quote}

Though this approach may lend itself to possible abuse, it avoids the necessity of a sale of appreciated assets in order to make a corporate distribution. This feature will prove particularly valu-

\textsuperscript{50} 288 N.Y. 280, 43 N.E.2d 43 (1942).
able where, as in some reorganizations, substantial distributions must be made without selling appreciated corporate assets.

The Commission similarly rejected "trust fund" notions in the initial sale of stock, payment for which may include notes or future services by the purchasers thereof. This provision, unlike those of all other states, is based on the theory that shares should be salable for the same forms of consideration for which any other commodities may be sold. Indeed, if the corporation can trade its assets for notes or future services, it would seem appropriate that it could do the same with its shares.

Other provisions relating to capital structure allow shares redeemable at the option of the shareholder as well as the corporation, permit extensive variations among series of shares, and allow reduction of stated capital upon resolution by the board of directors, without a shareholder vote. The overall result is a form of financial freedom for corporations unique to American corporation law.

D. Management and Control

Particularly in close corporations, the standardized management and voting structure imposed by most corporation laws involves unnecessary formality and tends to frustrate desirable managerial arrangements. There is little basis in policy, for example, behind the prohibition against agreements withdrawing managerial discretion from ("sterilizing") the board of directors by restrictive agreements, particularly if all shareholders are signatories. Only in very recent years have such agreements been accepted by the courts. The need for statutory guidance is obvious, and the proposed statute provides it. Voting agreements of virtually every description are validated, though agreements affecting operations of the corporation, as opposed to simply voting pools, must be signed by all the shareholders. Share transfer restrictions of every type, including "consent restraints" are similarly authorized—again with the requirement that the re-

53 Id. § 406.
54 But see Petrishen v. Westmoreland Fin. Co., 394 Pa. 552, 147 A.2d 392 (1959) (validating future services as consideration, where stock was issued to induce employee to leave former employment).
55 On this point, the Reporter dissented from the Commission's views.
57 Id. § 402.
58 Id. § 418.
straints be consented to by the restrained shareholders (unless, of course, the shares were purchased subject to the restraint).\textsuperscript{61} Coupled with these provisions are sections deleting Michigan's archaic mandatory cumulative voting,\textsuperscript{62} broadly permitting irrevocable proxies,\textsuperscript{63} and allowing for dissolution by previous agreement of the shareholders and in the event of deadlock.\textsuperscript{64}

A more unusual provision, adopted verbatim from the Delaware Law,\textsuperscript{65} allows any action to be taken by shareholders without a meeting, provided only that a sufficient number of shareholders to approve the action consent in writing thereto.\textsuperscript{66} Thus, if a majority block of shares is owned by a group of shareholders, they may under this section (unless otherwise provided in the articles of incorporation), amend the articles, merge, dissolve, etc., simply by giving the minority shareholders \textit{subsequent} notice of the action taken. This section recognizes realistically that a majority block of shares can effect a corporate action in any event, and that prior notice and formal vote do not affect the result.\textsuperscript{67} On this issue, however, the Reporter dissented from the Commission recommendations. The section as proposed would allow majority shareholders to merge or change the corporation with no prior notice to the minority. Moreover, the section would apply to existing corporations, whose shareholders could not have contemplated the introduction of this unique rule. The dissent suggests that \textit{affirmative} provisions in the articles be required if such action without a meeting is to be allowed; and that in any event, major corporate changes not be subject to action without a meeting. This dissenting approach is in effect in New Jersey.\textsuperscript{68} Even if only the New Jersey approach is adopted, Michigan will become the third state to allow action by shareholders without a meeting upon less than a \textit{unanimous} vote of shareholders.\textsuperscript{69}

Just as excessive shareholder formality has trammelled corpo-

\textsuperscript{61} Id. § 516, derived from \textit{Del. Code Ann.} tit. 8, § 202 (Supp. 1968). Many decisions have upheld transfer restrictions which confer a first option to purchase shares upon the corporation or a stated group of shareholders. By contrast "consent restraints" simply prohibit transfer of the shares without the consent of the corporation or of stated individuals.


\textsuperscript{63} Id. § 507.

\textsuperscript{64} Id. §§ 904, 912. Note, too, that section 912 is drafted to avoid the early interpretation requiring irreparable injury to secure dissolution: \textit{Compare In re} Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954).

\textsuperscript{65} \textit{Del. Code Ann.} tit. 8, § 228 (Supp. 1968).


\textsuperscript{67} Nevertheless section 14 and the proxy rules under the 1934 Securities Exchange Act would require such a prior notice with respect to any section 12(g) corporation.


\textsuperscript{69} \textit{Compare MBCA} § 145 and present \textit{Mich. Comp. Laws} § 450.39a (Supp. 1970)—action without meeting only on unanimous consent.
rate action prior to statutory change, limitations on director action, together with fears of director liability, have stood in the way of free action by the corporate management. The proposed Act deals with all of these problems. The Act permits classification of the board of directors, with no lower limit on the size of each class. In addition, it allows provision in the articles for election of a director or directors by the shares of any class or series. The Act allows action by the directors without a meeting by unanimous consent, and permits a director or directors to be present at a meeting by means of conference telephone facilities. It makes broad provision for loans to directors and officers when "such assistance may reasonably be expected to benefit the corporation," thus considerably liberalizing existing law which requires a two-thirds disinterested vote of the board. The Act includes a broad provision, similar to those now in effect in New York, New Jersey and Delaware, validating transactions with interested directors. Such a transaction is not void or voidable solely because of interest, provided any of three criteria is satisfied: (1) the transaction was fair and reasonable when authorized; (2) the board had knowledge of the interest and the transaction and approved it by a sufficient disinterested vote; or (3) the shareholders had knowledge of the interest and the transaction and approved it.

E. Indemnification of Directors and Officers

Much interest has recently been focussed on the problems of director liability, particularly in the context of cases like BarChris. A joint committee of draftsmen for the Model Act and the Delaware Corporation Law prepared an inclusive section on indemnification and insurance for directors that has now been written into the Model Act and the Delaware law. That section, with several changes, was included in the proposed Act. The

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72 Id. § 606(c).
73 Id. § 612.
78 MBCA § 5; Del. Code Ann. tit. 8, § 145(h) (2 P-H Corp. § 1560 (June 10, 1970)).
proposed section distinguishes indemnification in third-party actions (allowing indemnification for judgments as well as expenses), from indemnification in actions by shareholders and the corporation itself (allowing indemnification for expenses only). Indemnification is mandatory in either situation where the defendant is successful "on the merits or otherwise." Where the defendant is not successful, indemnification is permissive "if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful." The italicized words, not present in the Delaware-Model Act formulation, were added to avoid the possibility that indemnification might be permissible in a Texas Gulf Sulphur insider-trading situation based on action not opposed to the best interests of the corporation. Permissive indemnification is by majority vote of a disinterested quorum of the board, by vote of the shareholders, or by written opinion of independent legal counsel. The statute also allows the corporation to advance expenses to a defendant who undertakes to repay such expenses in the event he is not found to be entitled to indemnification.

The Delaware and Model Act formulation further provides that the corporation may take out insurance for a director, officer or employee whether or not it could indemnify him under the other provisions of the section, and that the corporation may by agreement or otherwise provide any other form of indemnification (a "non-exclusive" clause). The first of these provisions was included in the proposed Michigan section to preclude placing unnecessary limits on insurance coverage. The second was rejected. Even the Model Act and Delaware draftsmen were unable to state what forms of indemnification agreement, not contrary to

81 This possibility is adverted to in Sebring, Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others, 23 Bus. Law. 95 (1967). The draftsman of the Delaware provision had some doubts concerning the Delaware draftsmanship in this connection; accordingly, he opposed the inclusion of the words "or not opposed to." See Note, Law for Sale: A Study of the Delaware Corporation Law of 1967, 117 U. Pa. L. Rev. 861, 879 (1969).
82 One commentator, critical of the breadth of the Delaware statute, questions whether "independent legal counsel" will prove genuinely independent in such a determination. See Bishop, Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers, 77 Yale L.J. 1078 (1968).
83 MBCA § 5(a); Del. Code Ann. tit. 8, § 145(g) (Supp. 1968).
84 MBCA § 5(f); Del. Code Ann. tit. 8, § 145(f) (Supp. 1968).
85 Proposed Mich. Bus. Corp. Act § 615. In any event, insurance companies may underwrite only "insurable risks," and are themselves subject to regulation in the public interest.
public policy, could be drafted which would not already fit within
the exceptionally broad coverage of the other subsections. In
place of the non-exclusive clause, the Michigan proposal provides
that any other form of indemnification “shall be invalid only
insofar as it is in conflict with this section.” In the opinion of the
Reporter, this language does not in fact alter the substance of the
Model Act–Delaware provision as it would be interpreted by the
court, but rather avoids any misleading implications of the Model
Act–Delaware provision.

F. Mergers, Consolidations and Sales of Assets

Another area of simplification, in which Michigan’s existing law
has provided impetus for out-of-state incorporation, is major cor-
porate changes: mergers, consolidation, dissolution, and sale of
assets. The proposed Act will afford the simplest procedures in
the nation for effectuating such major changes. Throughout the
statute, majority vote has been adopted (except as otherwise
provided in the articles of incorporation), which, as noted ear-
lier, may be achieved without a shareholder meeting. Uniform
procedures for class vote and greater-than-majority vote are
tied directly into the appropriate substantive sections by cross-
reference.

In addition, Michigan has looked to the examples set by Dela-
ware and New Jersey in providing for no-vote mergers and in
limiting the dissenters’ appraisal remedy. Thus, the now common
short-merger provision (though not currently in effect in Mich-
igan) is included in a very liberal form. Uphill and downhill
mergers, as well as multiple-corporation mergers, are permitted
without a vote of any kind if the parent corporation survives and
owns ninety percent of the outstanding shares of each class of
subsidiary being merged. A provision drawn from Delaware
law provides for merger without the vote of the surviving corpo-

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86 See Sebring, supra note 81, at 105. The Delaware draftsmen opposed the
non-exclusive clause. Law for Sale: A Study of the Delaware Corporation Law of 1967,
supra note 81, at 883.

87 The proposed Act requires majority vote for: amendment of articles; merger or
702, 802, 808, 902.


89 Id. § 508(c), (d).

90 Id. § 513.

91 Id. § 804.

92 In uphill merger the subsidiary is merged into the parent and the parent survives; in
downhill merger the parent is merged into the subsidiary and the subsidiary survives. A
vote is required if so provided in the articles, or if a subsidiary is to be the surviving
corporation, or if the articles of the parent are to be amended in a manner that would

93 DEL. CORP. LAW § 251(f) (2 P-H CORP. ¶ 2726 (June 10, 1970)).
ration's shareholders where the plan of merger does not amend its articles or change or redeem any shares of stock outstanding immediately prior to the merger, and where the shares of common stock to be issued or delivered under the merger plan do not exceed twenty percent of the shares of common stock outstanding immediately prior to the merger. Moreover, in such a situation, the shareholders of the surviving corporation have no appraisal remedy.

The impact of these provisions will be that a growing corporation with adequate authorized shares can expand by merger, without a vote of its shareholders, either by "creeping acquisition" of another corporation until the ninety percent threshold is reached (in which event no vote of the subsidiary is required either); or by direct merger if the expanding corporation issues no more than twenty percent common stock in the transaction (in which event a vote of the disappearing corporation's shareholders will ordinarily be required).

In fact, the substance of these transactions could, before these provisions were drafted, have been carried out without a vote of the acquiring corporation by means of the "C Reorganization," which consists of a sale of assets by the disappearing corporation to the surviving corporation (in return for shares of the surviving corporation), followed by dissolution of the disappearing corporation and distribution to its shareholders of the shares received in the sale. The wide use of this approach to achieve the substantive result of a statutory merger led to some judicial attempts to characterize the transaction as a "de facto" merger, requiring the formalities of a true statutory merger. This approach was resoundingly rejected in Delaware on the basis that the alternatives clearly permitted by the statute should not be precluded by judicial reconstruction of the transaction. Though the status of the "de facto" merger doctrine is unclear where it has not been litigated, as in Michigan, the proposed section 808 does not adopt the doctrine, and the notes thereto reject any such interpretation of the section. Section 802(c) will, in addition, allow the use of the statutory merger in some situations with no further formality than otherwise would have been required by the sale-of-assets merger.

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95 Id. § 809(d).
96 INT. REV. CODE of 1954, § 368(a)(1)(C).
97 See, e.g., Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958) (putative purchasing corporation was in fact the selling corporation); Rath v. Rath Packing Co., 257 Ia. 1277, 136 N.W.2d 410 (1965) (de facto merger).
In at least some circumstances the statutory merger may be desirable for other purposes, and this new provision allows its use without the greater formality previously required.

For some time, commentators have been critical of the appraisal remedy provided by most statutes for shareholders who dissent from mergers and consolidations and from sales of all or substantially all the corporate assets. The remedy has been attacked primarily on the ground that it can be used by a small minority to effectively block a merger. If, for example, fifteen percent of the shares demand cash, the cash drain—together with the potential litigation on the question of value—may render the entire transaction too expensive. Moreover, the complexity of the remedy seriously limits its value to the complaining shareholder, whose time and expense in the necessarily complex appraisal proceedings may cost more than the value of the shares themselves.

In at least one setting—where the shares affected have a ready market which is not unusually or adversely affected by the announcement of the proposed merger—the elimination of the appraisal remedy seems clearly appropriate. The complaining shareholder in that situation may sell his shares more simply than he may obtain appraisal; and it seems perfectly fair to require that he do so, rather than burden the corporation with a complex and expensive procedure. This approach was ultimately included in the revised Delaware law.

The proposed Michigan statute, though providing appraisal in two situations not historically allowed in Delaware, constitutes the most sweeping limitation of appraisal yet proposed. In summary, appraisal is excluded—except as otherwise provided in the articles of incorporation: whenever the shares affected "are listed on a national securities exchange or are held of record by not less than 2,000 persons;" whenever the consideration for the

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99 Delaware has never provided the appraisal remedy in the sale-of-assets situation.
100 For a brief against the appraisal remedy, see Manning, The Shareholder's Appraisal Remedy: An Essay for Frank Coker, 72 Yale L.J. 223 (1962); see also Vorenberg, Exclusiveness of the Dissenting Stockholder's Appraisal Right, 77 Harv. L. Rev. 1189 (1964).
101 The appraisal decisions, interestingly enough, particularly in Delaware—have rarely accepted even a genuine market price as the inherent value of the shares. See, e.g., Application of Delaware Racing Ass'n, 213 A.2d 203 (Del. Sup. Ct. 1965); Perlman v. Feldmann, 154 F. Supp. 436 (D. Conn. 1957).
103 Sale of assets and certain amendments; see infra note 113 and accompanying text discussing section 704.
merger or sale of assets (followed by dissolution of the selling corporation) consists of any combination of cash, bonds or shares, provided any such shares are listed on a national securities exchange or are held of record by not less than two thousand persons; and when the dissenter owns shares in the surviving corporation to a section 802(c) merger.105

The Reporter dissented to this section, noting that it goes well beyond the Delaware law106 which requires marketability of the shares surrendered and the shares received. If no market exists for disposition of the shares when the merger plan is announced, the dissenting shareholder has no remedy until after the merger is consummated. In this respect, the proposed Michigan statute provides substantially less protection than Delaware's. Moreover, the original conception of the Delaware provision is based on the theory that a market provides adequate protection. Yet, it remains true that announcement of a merger plan may have a substantial adverse effect on the market. A market at a sacrifice price is hardly an adequate safeguard; indeed, all the appraisal statutes recognize this point by setting the valuation independently of any effect caused by the announcement of the plan.107 Under the proposed statute, the objecting shareholder in the cited situation would have only the alternative of attempting to enjoin the transaction. It was precisely this result that the original appraisal statutes were intended to avoid, and the reduction of appraisal may unfortunately result in the widespread issuance of injunctions against proposed mergers.

The solution to this dilemma is not readily apparent, although one possibility considered and rejected by the Law Revision Commission was to eliminate appraisal only where the stock price does not drop below a stated percentage (e.g., seventy-five percent of its price in the interval between the announcement of the plan and the record date for voting).108 This approach would deter injunction attempts and would also provide some genuine basis for assuring the dissenting shareholder that he could withdraw from the proposed venture without substantial adverse effect.

IV. SOME UNIQUE PROVISIONS

In several respects the proposed Michigan corporation statute clearly stands in the forefront of "liberalized" state corporation

105 See notes 93-99 supra.
107 E.g., MBCA § 81, ¶ 1.
108 See Reporter's Dissent to section 809.
laws, and at the same time provides for "protective" measures not now found in the major statutes.

The proposed Act is the first to permit elimination of share certificates. The physical handling of share certificates entails substantial expense and risk of loss, and it now appears clear that alternatives to share certificates will necessarily be introduced within the coming decade. Although it would be possible to detail an alternate procedure to replace stock certificates, commentators and the exchanges are still unclear what the best procedure would be. Indeed, the procedures will most likely be determined by the exchanges and the proposed statute makes provision in that form:

Unless otherwise provided in the articles of incorporation, if the shares or other securities of a corporation are listed on a national securities exchange, the corporation may by resolution of the board eliminate certificates representing such shares or securities and provide for such other methods of recording and noticing ownership as may be provided by the rules of such national securities exchange.

The proposed Act includes a section, derived from New York law, that provides an appraisal remedy upon amendment of the articles if the amendment materially alters or abolishes any preferential right of a share having preferences, or creates, alters or abolishes any material provisions on redemption or a sinking fund for redemption of such shares. Since appraisal proceedings are limited to situations of non-marketability of shares, this section provides protection against dilution of preference rights in those situations where the affected shareholder has no relief in the marketplace.

A new provision, derived in part from the Model Act and in part from the South Carolina law provides protection against oppressive acts of majority shareholders. The section gives the usual discretion to the circuit court to dissolve the corporation upon the action of a shareholder "when it is established that the

111 See note 109 supra.
112 N.Y. BUS. CORP. LAW § 806(b) (6) (McKinney Supp. 1970).
114 MBCA § 97(a).
acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to such shareholder." In addition, however, the section provides that upon establishment of the grounds for relief, the court may grant alternative relief, to include without limitation: cancelling or altering any provision in the articles or by-laws; cancelling, altering or enjoining any resolution or other act of the corporation; directing or prohibiting any act of the corporation, its shareholders, directors or officers; and providing for purchase of the shares of any shareholder by the corporation or by those responsible for the wrongful acts. Some favorable experience has developed with this approach in England and the Commonwealth countries. It has the virtue of being far less restrictive than the draconian remedy of dissolution alone. Moreover, since the alternative remedies are permissive, they allow some discretion in the court: thus it would be unlikely that the remedies would be applied to a publicly marketed corporation, where sale of the shares would provide adequate remedy for the complaining shareholder.

Finally, the new Act carries forward Michigan's admirable—but not universally followed—practice of mandatory annual report to the shareholders. This is consistent with the approach that full information to shareholders is frequently more effective protection than restrictive substantive provisions.

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117 See, e.g., Gidwitz v. Lanzit Corrugated Box Co., 20 Ill.2d 208, 170 N.E.2d 131, 138 (1960) ("The cumulative effects of these many acts and incidents ... combine to constitute that oppression which entitles plaintiffs to the only remedy provided by law—dissolution").
