

3-1982

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Recommended Citation

Harry J. IV Haynsworth, Revision of the 1981 South Carolina Business Corporation Act: A Critique and Agenda for Further Reform, 33 S. C. L. Rev. 449 (1982).

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THE 1981 REVISION OF THE SOUTH CAROLINA BUSINESS CORPORATION ACT: A CRITIQUE AND AGENDA FOR FURTHER REFORM

HARRY J. HAYNSWORTH, IV*

The 1981 South Carolina Business Corporation Act (1981 Act)¹ extensively revises the South Carolina business corporation statute.² The preceding article presents a detailed discussion of the changes made.³ The purpose of this article is twofold: (1) to critique the 1981 Act and (2) to propose additional revisions in the 1981 Act and in related South Carolina business and commercial statutes.

I. COMPARISON OF THE 1981 ACT WITH THE MODEL BUSINESS CORPORATION ACT

The first clause in the title of the 1981 Act states:

An Act to Amend . . . The South Carolina Business Corporation Act, So As To Provide For Certain Changes . . . That Will Make The Act More Closely Conform To The Provisions Of The Model Business Corporation Act[4] And Current Busi-

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1. 1981 S.C. Acts —, No. 146 [hereinafter cited as 1981 Act]. Unless otherwise indicated, all code section references in this article are to the South Carolina Code Annotated. Provisions of the South Carolina Business Corporation Act of 1962 (1962 Act) (codified at S.C. CODE ANN. §§ 33-1-10 to 33-25-90 (1976)) are cited as sections of the 1976 Code and appear by section number and date of the Code. *E.g.*, § 33-1-10 (1976). Provisions of the 1981 Act are cited by the code section numbers assigned in 1981 S.C. Acts —, No. 146, and appear by section number preceded by "Revised". *E.g.*, Revised § 33-1-10.

2. The 1981 Act amended or repealed all but 14 of the 170 sections in title 33, chapters 1 through 25 of the 1976 South Carolina Code. Several new sections were added in chapters 1 through 25, and additional amendments were made in titles 15 (service of process), 34 (voting by shareholders of savings and loan associations), and 35 (revised Takeover Bid Disclosure Act). 1981 S.C. Acts —, No. 146 §§ 3-9.

3. See Adams, *The 1981 Revision of the South Carolina Business Corporation Act*, 33 S.C.L. REV. 405 (1982).

4. ABA-ALI MODEL BUSINESS CORPORATION ACT (1953) [hereinafter cited as MODEL

ness Operations⁵

Evaluation of the 1981 Act in terms of existing provisions in the Model Business Corporation Act (Model Act) is therefore appropriate.

In most areas the 1981 Act follows either entirely or at least substantially the equivalent provisions in the Model Act.⁶ For

Act]. The Model Act is published in a compiled form with comments in MODEL BUS. CORP. ACT ANN. (2d ed. 1971 & Supps. 1973 & 1977). Changes in the Model Act are approved by the ABA Committee on Corporate Laws and published in *Business Lawyer*. References to the Model Act in this article are to the Model Act as amended through July 1, 1981.

The Model Act has been used as the basis for corporate statutes in at least twenty-five states. See 1 MODEL BUS. CORP. ACT ANN. § 1, ¶ 2 (2d ed. 1971). The Model Act and the Delaware Business Corporation Act, DEL. CODE ANN. tit. VIII (1975 & Supp. 1980), have traditionally been the most influential statutes used by other states in revising their corporate codes.

5. 1981 S.C. Acts —, No. 146 (emphasis added).

6. Changes were made, however, in voting requirements as part of a general principle that any fundamental change in the corporate structure should be approved by a two-thirds vote, with the option of lowering the required vote to a simple majority or raising the vote above the statutory limit by so providing in the articles of incorporation. The Model Act uses a majority vote standard with the right to require higher standards in the articles. Because adoption of a majority voting rule for all purposes under the 1981 Act is possible if appropriate language is used in the articles, the purpose served by the rather convoluted revision is difficult to understand. If a mandatory minimum two-thirds vote for fundamental changes is undesirable, the simpler voting scheme of the Model Act seems preferable to the requirements of the 1981 Act. Section 143 of the Model Act, by authorizing supermajority provisions with respect to all shareholder action, eliminates the need for a separate supermajority provision in each section that specifies shareholder voting rights. In addition, a recently approved amendment to § 143 of the Model Act protects supermajority provisions against termination or change by amendment of the articles of incorporation unless the amendment is adopted by no less than the same vote as is required to take action under the provision that is to be amended. See *Changes in the Model Business Corporation Act—Amendment Respecting Increases in Proportion of Vote for Shareholder Approval*, 36 BUS. LAW. 1899 (1981).

If the 1981 Act is not amended to incorporate the Model Act voting format, resolution of the following inconsistencies in the 1981 Act's voting provisions should be considered:

(1) Revised § 33-9-220(a)(3), which sets out the requirements for reduction of stated capital, requires a two-thirds vote of "the shares entitled to vote thereon." The 1962 Act and most of the other supermajority voting provisions in the 1981 Act require a two-thirds vote of all outstanding shares, whether or not otherwise entitled to vote.

(2) Revised § 33-15-40(c) states that the articles of incorporation may contain a provision requiring "a vote greater than, but in no event less than," a two-thirds vote for approval of amendments to the articles of incorporation. Subsection (d), however, states that the vote of the shareholders required for corporate action "may be otherwise set in the articles, but shall not be less than a majority of the shares"

(3) The same inconsistency that exists in Revised § 33-15-40 appears in Revised § 33-17-30 (shareholder approval of mergers, consolidations, and share exchanges) and in

example, the 1981 Act's indemnification⁷ and derivative action⁸ provisions and provisions setting forth responsibilities⁹ and standard of care for directors¹⁰ are essentially identical to present Model Act provisions.¹¹ These provisions alone make the 1981

Revised § 33-19-30 (shareholder approval of sale of assets other than in the regular course of business).

(4) Under Revised § 33-21-20, the voting requirement for a voluntary dissolution has been reduced to a simple majority from the two-thirds standard of the 1962 Act. S.C. CODE ANN. § 33-21-20 (1976). Moreover, subsection (a)(4) of this section allows a provision in the articles requiring "a different vote." This would allow the articles to contain a provision authorizing dissolution by a vote of less than a majority. A specific provision in the articles of incorporation giving one or more shareholders the right to dissolve a corporation is allowed, however, by Revised § 33-21-130. This section requires printed notice of the special dissolution right on all share certificates and requires the unanimous approval of shares entitled to vote for amendment of the articles to include such a provision. Revised § 33-21-130 also renders the dissolution provision invalid if the shares of the issuing corporation become listed on a national securities exchange. Revised § 33-21-20 contains no cross reference to Revised § 33-21-130. The inconsistency between the two sections can best be remedied by including a statement in Revised § 33-21-20 that the requirements of Revised § 33-21-130 must be met when a vote of less than the majority is required for dissolution.

(5) The provision of Revised § 33-21-130 that requires the approval of all outstanding shares "entitled to vote" for adoption of an amendment to the articles of incorporation authorizing one or more shareholders to dissolve the corporation represents a change from the 1962 Act, which required the unanimous vote of all outstanding shares.

(6) Revocation of a voluntary dissolution proceeding is now authorized by "the affirmative vote of two-thirds (2/3) of outstanding shares voting at such meeting." Revised § 33-21-70(a)(2). The 1962 Act required a two-thirds vote of all outstanding shares. § 33-21-70(c) (1976). In addition, requiring a two-thirds vote to revoke a voluntary dissolution seems inconsistent with the provision in Revised § 33-21-20(a)(4) that requires only a majority vote to approve a voluntary dissolution.

7. Revised § 33-13-180.

8. Revised § 33-11-290.

9. Revised § 33-13-10.

10. Revised § 33-13-150.

11. MODEL ACT, *supra* note 4, §§ 5 (indemnification), 35 (duties and liabilities of directors), and 49 (derivative actions). There are some differences between the 1981 Act and these Model Act provisions. The 1981 Act, for example, does not contain the final revisions made in the Model Act indemnification provisions. See Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 36 BUS. LAW. 99 (1980). Although these changes were relatively minor, the importance of this issue and the likelihood that courts will look to the Model Act and Comments to Model Act provisions in cases involving indemnification issues make it desirable to amend Revised § 33-13-180 to bring it into precise conformity with Model Act § 5.

Three major substantive differences distinguish the new South Carolina derivative provision, Revised § 33-11-290, from the existing Model Act § 49: (1) the Model Act contains a provision, which does not appear in the 1981 Act, that requires a special bond to be posted as a prerequisite to maintaining the action if the plaintiffs own less than 5% of the outstanding shares and the shares have a market value of \$25,000 or less; (2)

Act worth all the time and effort expended in its enactment.¹²

The 1981 Act failed, however, to incorporate significant 1979 amendments that extensively revised and simplified the financial provisions of the Model Act. The most critical of these revisions occurred in Model Act section 45,¹³ which replaced all

section 33-11-290(b) of the 1981 Act contains a provision, not included in the Model Act, that requires the plaintiff to specify in the complaint the action taken in an attempt to convince the directors to initiate the action or the reasons for not making this effort; and (3) the 1981 Act at Revised § 33-11-290(d), unlike the Model Act, requires court approval of any settlement or discontinuance of a derivative action. Revisions to § 49 of the Model Act have been tentatively approved by the ABA Committee on Corporate Laws, Committee on Corporate Laws, *Proposed Revisions of the Model Business Corporation Act Affecting Actions by Shareholders*, 37 BUS. LAW. 261 (1981). The tentative revision of § 49 eliminates the bonding requirement in the existing section and includes the provisions contained in South Carolina's 1981 Act that relate to efforts to have the board of directors initiate the action and court approval of any settlement or discontinuance. Revised § 49 also contains three provisions not in the 1981 Act that should be considered for adoption by the South Carolina Legislature: (1) beneficial owners of shares held by a nominee, an increasingly common situation, are specifically made eligible to file a derivative suit; (2) the complaint must be verified; and (3) when a corporation undertakes an investigation after demand by a plaintiff or filing of the suit, the court is expressly authorized to stay the action pending the outcome of the investigation. *Id.* at 262.

The major substantive difference between 1981 Act and Model Act treatment of director liability is a provision in the 1981 Act that sets a limitation period for actions against directors alleging mismanagement. These actions must be brought within three years after accrual of the cause of action or two years after the facts giving rise to the cause of action are or should have been discovered, whichever is earlier. Revised § 33-13-150(d). *See also* Revised § 33-13-190(h), which contains an identical limitation provision for actions alleging liability of directors for making improper dividends and other distributions and unlawful loans or guarantees. These statutes of limitation would presumably be applicable in derivative actions brought under Revised § 33-11-290. This represents a significant change from existing South Carolina law. *See* S.C. CODE ANN. § 15-3-530(9) (1976) (six years), § 15-3-530(7) (1976) (six years from date of discovery for certain causes of action based on fraud). Under the Model Act, as under prior South Carolina law, actions against directors alleging mismanagement are governed by the state's general statutes of limitation. *See generally* W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 998-1001 (5th ed. unabr. 1980).

12. This is particularly true with respect to revision of the indemnification provisions in § 33-13-180 (1976), which were so incomplete and confusing as to be literally impossible to utilize. *See Roberts, The 1981 Revision of South Carolina Business Corporation Act—An Introduction*, 33 S.C.L. REV. 397, 397-98 (1982).

13. MODEL ACT, *supra* note 4, § 45, after recent revisions reads in part:

Subject to any restrictions in the articles of incorporation, the board of directors may authorize and the corporation may make distributions, except that no distribution may be made if, after giving effect thereto, either:

(a) the corporation would be unable to pay its debts as they become due in the usual course of its business; or

(b) the corporation's total assets would be less than the sum of its total liabilities and (unless the articles of incorporation otherwise per-

the traditional dividend limitations based on current earnings and earned and capital surplus with twofold equity and balance sheet insolvency tests. Excision of the surplus test for dividends rendered the concepts of par value, stated capital, and treasury shares unnecessary; revised section 45 therefore eliminated these concepts. Eliminating the intricacies of various types of surplus and treasury shares¹⁴ greatly simplifies corporate finance and represents a major innovation in corporate law.¹⁵

The limitations on corporate distributions contained in the South Carolina Business Corporation Act and in the corporate statutes of most other states are most often justified by claims that they protect minority shareholders, the holders of senior securities, and other creditors.¹⁶ The protection provided by the concept of par value, however, is ineffectual because no statutory minimum par value is required, and no-par stock with a nominal allocation to stated capital is authorized.¹⁷ Just how little protection is achieved by the related concepts of stated capital, capital surplus, and earned surplus is apparent in the following illustration: X Corporation, incorporated in South Carolina, has outstanding 1,000 shares of common voting stock with a par value of \$100 per share. The corporation has no earned surplus but has a capital surplus of \$100,000. The corporation's account-

mit) the maximum amount that then would be payable, in any liquidation, in respect of all outstanding shares having preferential rights in liquidation.

Determinations under subparagraph (b) may be based upon (i) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, or (ii) a fair valuation or other method that is reasonable in the circumstances.

Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867, 1872 (1979). An excellent explanation of the technical aspects of § 45 is contained in the Comment to § 45. *Id.* at 1881-86.

14. Under revised Model Act § 6, all reacquired shares are automatically classified as authorized but unissued shares. *Id.* at 1869. Some existing corporate law problems concerning treasury shares are described in B. MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 130-35 (2d ed. 1981).

15. See B. MANNING, *supra* note 14, at 165-80. This publication contains an excellent analysis of legal problems that result from the traditional concepts of corporate capital. *Id.* at 84-163. The author's thesis is that the traditional concepts are hopelessly inconsistent and present many insoluble problems.

16. *Id.* at 1-15.

17. See Revised §§ 33-1-20(24), -7-30(b)(1), -9-70, -9-140. The 1981 Act provisions are identical to those in the 1962 Act.

ing firm has appraised the fair market value of the corporation's assets at \$100,000 over the value shown on the corporation's balance sheet. Most of this unrealized appreciation is in a manufacturing plant built several years ago. Assume further that during the current year X has no net profit. Subject only to the limitation that it can pay its debts as they become due in the ordinary course of business, X Corporation, with no current earnings or earned surplus, can nevertheless legally declare a dividend of \$299,990 or pay up to \$299,990 to redeem its shares. The following procedure accomplishes this result. First, the holders of two-thirds of the shares approve a reduction of the par value of the common stock from \$100 to one cent, creating additional capital surplus of \$99,900.¹⁸ Second, the holders of two-thirds of the shares vote in favor of resolutions allocating to capital surplus the unrealized appreciation in the assets¹⁹ and authorizing the use of the total capital surplus for the distribution.²⁰ These actions create a capital surplus of \$299,990—the original \$100,000, the \$100,000 of unrealized appreciation, and the \$99,990 created by the reduction in par value—available for distribution as dividends or for redemption.

As is indicated by the above illustration, the protection provided by the traditional limitations on corporate distributions, reenacted by the 1981 Act, is essentially illusory.²¹ Actually, the

18. Revised § 33-9-220.

19. Although Revised § 33-1-20(11) states that "[u]nrealized appreciation of assets shall not be included in earned surplus," no similar prohibition is found in the definition of capital surplus. See Revised § 33-1-20(6). Professor Ernest L. Folk, who was the principal draftsman of the 1962 Act, concluded in his Reporter's Notes that it would be permissible to use unrealized appreciation to increase capital surplus. JOINT COMM. OF THE GEN. ASS'Y TO INVESTIGATE THE FEASIBILITY OF REVISING THE LAWS OF THIS STATE RELATING TO CORPORATIONS AND SECURITIES, SOUTH CAROLINA BUSINESS CORPORATION ACT 50-51 (ann. ed. 1964). Commentators have also concluded that an unrealized appreciation revaluation can properly be allocated to capital surplus under the old Model Act financial provisions, which were the basis for the 1962 Act. See 1 MODEL BUS. CORP. ACT ANN. 36 (2d ed. 1971); Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 HARV. L. REV. 1357, 1380-81 (1957). The 1962 Act definitions of earned surplus and capital surplus are carried forward into the 1981 Act without change.

20. Revised §§ 33-9-170, -180(b).

21. Restrictions on dividends and other distributions are commonly drafted into instruments setting out the rights of shareholders of senior securities and secured creditors to supplement the traditional restrictions on corporate distribution. See Kummert, *State Statutory Restrictions on Financial Distribution by Corporations to Shareholders*, 55 WASH. L. REV. 359, 373-74 (1980). Protection of the interest of minority shareholders can be achieved by means of class voting rights, supermajority voting rights, and contractual

1981 Act affords even less protection to minority shareholders than did the 1962 Act. While the 1962 Act required a minimum two-thirds vote of shareholders to reduce stated capital or to authorize a distribution from capital surplus,²² it is possible under the 1981 Act to approve such action by a majority shareholder vote if the articles of incorporation so provide.²³

A persuasive argument can be made that the revised Model Act financial provisions provide greater actual protection to shareholders and creditors than do the traditional restrictions. The revised Model Act requires that a distribution meet not only an equity insolvency test, which is the only effective restriction under the traditional surplus rules,²⁴ but also a balance sheet insolvency test.²⁵ In many situations, a corporation may be able to meet its obligations as they become due but is insolvent on a balance sheet basis.²⁶ A distribution under such circumstances is illegal under the revised Model Act but might be entirely proper under the 1981 Act.²⁷

Failure to incorporate the financial provisions of the revised Model Act in the 1981 Act was a serious error.²⁸ Their adoption would offer advantages sufficient to justify revision, however ma-

provisions in a shareholder-management agreement. See F. O'NEAL, *CLOSE CORPORATIONS* §§ 3.11-5.39 (2d ed. 1971).

22. §§ 33-9-170(a)(2), -180(b), -220(a)(3) (1976).

23. Revised §§ 33-9-170(c), -180(g), -220(c).

24. See illustration in text accompanying notes 18-20 *supra*.

25. MODEL ACT § 45. See note 13 and accompanying text *supra*.

26. In determining whether the balance sheet test is met under MODEL ACT § 45, liquidation preferences on senior securities are treated as liabilities and the asset valuation must be based on the corporation's financial statements, an appraisal, or any other method that in the judgment of the directors will provide a fair valuation of the corporation's total assets. See *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867, 1883-85 (1979). The comment further states that "[i]n most cases, a fair valuation method on a going concern basis would likely be appropriate, if expectations are that the enterprise will continue as a viable going concern, . . . [and that] [o]rdinarily a corporation should not selectively revalue assets." *Id.* at 1885.

27. The distribution in the example given in the text accompanying notes 18-20 *supra* would also be proper under MODEL ACT § 45 because the facts state that an appraisal had been conducted. Under the new Model Act provisions, however, no one is likely to be misled by the appearance of illusory safeguards.

28. Minnesota, which also enacted a comprehensive revised business corporation act in 1981, adopted the revised Model Act financial provisions. See MINN. STAT. ANN. § 302A.551 (Supp. 1981). California adopted similar distribution provisions in 1975. See CAL. CORP. CODE §§ 500-511 (West 1977 & Supp. 1981).

jor, of the 1981 Act.²⁹

Even if the revised Model Act provisions are not adopted, a change made by the 1981 Act in section 33-9-160(a)(1)(C), dealing with the treatment of stock dividends, should be repealed and the 1962 Act language reenacted. Under the 1962 Act, the fair market value of a stock dividend could be allocated from either earned surplus or unrestricted capital surplus at the discretion of the directors. An amount equal to the aggregate par value of the dividend shares—or, in the case of no-par stock, the aggregate amount allocated to stated value by the directors—was transferred to the stated capital account. The difference between the amount allocated to stated capital and the fair market value of the dividend shares was, at the discretion of the directors, either transferred from earned surplus to capital surplus or, to the extent capital surplus was used to cover the excess, placed in a restricted capital surplus account.³⁰

Section 33-9-160(a)(1)(C) of the 1981 Act apparently attempts to set a generally accepted accounting principle (GAAP) standard for treatment of stock dividends applicable for corporate purposes.³¹ This standard requires that, except in the case of a closely held corporation, an amount of earned surplus equal to the full fair market value of the stock dividend must be transferred to either stated capital or capital surplus when a stock dividend is declared.³² Existing capital surplus may not be allo-

29. Adoption of the revised Model Act financial provisions would require either amendment or repeal of the following 1981 Act provisions: Revised §§ 33-1-20, -30; 33-9-10, -20, -50, -70, -90 to -120, -140 to -230; 33-11-20, -210; 33-13-110, -190; 33-15-10, -20, -50, -60; 33-23-20.

30. § 33-9-160(a) (1976). See SOUTH CAROLINA BUSINESS CORPORATION ACT, *supra* note 19, at 52 (Professor Folk's Reporter's Notes). See also 1 MODEL BUS. CORP. ACT ANN. § 45, ¶ 2, at 925 (2d ed. 1976); Hackney, *supra* note 19, at 1386.

31. As amended, Revised § 33-9-160(a)(1)(C) requires that the value of the stock dividend in excess of the aggregate amount allocated to stated value "shall be credited if required by generally accepted accounting principles to one of the capital surplus accounts of the corporation."

32. Amer. Inst. of Accountants, Accounting Res. Bull. No. 43, Chapter 7, ¶¶ 1-16 (1953), reprinted in J. COX, FINANCIAL INFORMATION, ACCOUNTING AND THE LAW 721-24 (1980). The application of the earned surplus rule to stock dividends by publicly held companies, however, is not automatic. It applies only when the amount of the new stock issued is small in comparison to the total number of outstanding shares and has no substantial effect on the market value of the issuer's stock. *Id.* ¶ 10. If the transaction does materially reduce the market price per share, then ARB No. 43 allows the transaction to be treated as a stock split, and no capitalization is necessary beyond that required by the applicable corporate statutes. *Id.* ¶ 11. Because of differences in size of corporations,

cated to the stock dividend because shareholders of publicly held corporations may mistakenly believe that a stock dividend is a distribution of earnings and may fail to realize that an allocation to the dividend of capital surplus rather than earned surplus could leave available for future distribution the full amount of the prior earned surplus.³³

The 1981 Act revision poses several problems. First, if revised section 33-9-160(a)(1)(C) indeed makes GAAP rules applicable for corporate purposes, the section would permit no discretion in the allocation of surplus accounts to fund a stock dividend of a publicly held corporation: the rules require that in the case of a publicly held corporation only earned surplus may be used. This limitation is inconsistent with the inference that may be drawn from revised section 33-9-70(d)³⁴—which omits specification of the nature of the surplus to be transferred for funding a stock dividend—that directors in all circumstances have the discretion to allocate either earned surplus or existing capital surplus to a stock dividend. Second, the revised language can be interpreted to allow a closely held corporation to capitalize only the amount of the stock dividend represented by the par value of the shares or, in the case of no-par shares, the amount allocated to par value by the directors without further effect on either earned surplus or capital surplus,³⁵ a procedure even more

number of shareholders, and market conditions, no bright line test distinguishing the two types of transactions is possible. ARB No. 43 states, however, that the earned surplus allocation rule will normally apply when the stock dividend increases the number of shares by 20-25% or less. *Id.* ¶ 13.

33. *Id.* ¶ 10.

34. Revised § 33-9-70(d) states:

That part of the surplus of a corporation which the board of directors directs to be transferred to stated capital and capital surplus upon the shares issued as a share dividend shall be deemed to be consideration for the issuance of such shares.

(emphasis added). Although the language of the 1962 Act is somewhat different, the substance of the two sections is identical. *See* § 33-9-70(e) (1976).

35. Literally, Revised § 33-9-160(a)(1)(C) necessitates a credit against a capital surplus account only “if required by generally accepted accounting principles.” Under the statutory construction rule of *expressio unius est exclusio alterius*, this provision could be interpreted to mean that in all situations when generally accepted accounting standards do not require a special allocation, no capital surplus account is affected. *See, e.g., Jones v. H.D. & J.K. Crosswell*, 60 F.2d 827, 828 (4th Cir. 1932); *Home Bldg. & Loan Ass’n v. Spartanburg*, 185 S.C. 313, 320, 194 S.E. 139, 142 (1937); 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 47.23-.25 (4th ed. 1972).

liberal than that permitted by the 1962 Act.³⁶ Third, in addition to preventing a stock dividend from misleading a shareholder about the effect on the issuer's earnings, the accounting rules attempt to distinguish between stock dividends and stock splits that are handled as stock dividends.³⁷ Section 33-9-160(c), however, expressly states that a stock split will not be construed as a stock dividend.³⁸ In effect, the 1981 Act tries to separate apples and oranges when only apples exist and thus compounds an already confusing situation.³⁹ Finally, differences between corporate law and generally accepted accounting principles are not inherently inappropriate because, for financial accounting purposes, the GAAP rules apply irrespective of provisions made by the corporate statutes.⁴⁰

In summary, the stock dividend allocation rules in the 1962 Act presented very little danger of substantial harm to shareholders or creditors. The 1981 revision, however, produces significant legal problems and should be repealed.

II. CLOSE CORPORATION PROVISIONS

Because all but a very small number of corporations incorporated in South Carolina are close corporations,⁴¹ a critique of

36. It is also potentially more dangerous because of the temptation not to capitalize more than the absolute minimum required by the statute.

37. See note 32 *supra*.

38. Revised § 33-9-160(c).

39. These allocation problems will be eliminated as far as corporate law is concerned if the revised Model Act's financial provisions are adopted. See notes 12-29 and accompanying text *supra*. A corporation would still, however, be required to comply with the accounting rules in ARB No. 43, *supra* note 32.

40. Other pressures force corporations with publicly traded stock to conform to the accounting standards. The New York Stock Exchange Rules, for example, require capitalization of all stock distributions of less than 25% of the outstanding stock exclusively from earned surplus. When the amount of new stock is between 25% and 100% of existing stock, the Exchange has the authority to require that earned surplus equal the fair market value of the stock to be capitalized. See 1 MODEL BUS. CORP. ACT ANN. § 45, ¶ 2, at 926-27 (2d ed. 1971).

41. No definition of a close corporation is universally accepted. As a general rule, close corporations are characterized as having a small number of shareholders, a substantial number of whom participate in the management of the business, and shares of stock that are not publicly traded in a recognized market. See, e.g., *Donahue v. Rudd Electrotrope Co.*, 367 Mass. 578, 586, 328 N.E.2d 505, 515, (1975). See generally F. O'NEAL, *supra* note 23, § 1.02. A recent statistical study of United States corporations indicated that approximately 95% of all corporations have ten or fewer shareholders, 99% have 100 or fewer shareholders, and the median corporation has assets of \$100,000 and three

the 1981 Act would be incomplete without a review of the changes made in the South Carolina Business Corporation Act's close corporation provisions. The 1962 Act was one of the first business corporation acts in this country to contain a significant number of special provisions for close corporations.⁴² Two of the most innovative features in the 1962 Act, section 33-11-220⁴³ (authorizing unanimous shareholder management agreements that allow a close corporation to be operated as if it were a partnership) and sections 33-21-150⁴⁴ and 33-21-220⁴⁵ (giving courts broad power to dissolve a corporation or to order any appropriate relief short of dissolution in cases of deadlock and oppression of minority shareholders) have been adopted by several other states.⁴⁶

A. Summary of Changes

The 1981 Act makes several changes in the 1962 Act's close corporation provisions. Perhaps the most significant of these is explicit authorization to operate without a board of directors if the corporation has a unanimous shareholder management agreement that meets the requirements of section 33-11-220.⁴⁷

shareholders. Conard, *The Corporate Census: A Preliminary Explanation*, 63 CALIF. L. REV. 440, 458-59, 462 (1975).

42. For a detailed discussion of the 1962 Act's close corporation provisions, see Myers, *The Close Corporation Under the New South Carolina Corporation Law*, 16 S.C.L. REV. 577 (1964).

43. § 33-11-20 (1976).

44. § 33-21-150 (1976).

45. § 33-21-220 (1976). This section has been redesignated as Revised § 33-21-155 in the 1981 Act.

46. See, e.g., DEL. CODE ANN. tit. 8, §§ 350, 351, 354 (1975); MICH. STAT. ANN. § 21.200(825) (Supp. 1981); N.J. REV. STAT. § 14A:12-7. (Supp. 1981).

47. Revised §§ 33-7-30(a)(5); -11-220(f); -13-10, -100(a)(6). But see Revised § 33-25-10(c), which requires that the names of directors be set out in the corporate annual report that must be sent to the Secretary of State. The language of new subsection (f) in Revised § 33-11-220, the section that authorizes shareholder management agreements, is troublesome. It states that "[s]o long as any agreement authorized by this section shall be in effect, no meeting of stockholders need be called to elect directors and the stockholders shall be deemed directors." Revised § 33-11-220(f)(emphasis added). This subsection literally makes all shareholders, whether or not they have voting rights, liable as directors in any corporation where the shareholders have entered into a Revised § 33-11-220 shareholder management agreement, even in situations when the corporation has a board of directors. The apparent intent of the subsection is to impose on shareholders the liability of directors in those situations when the shareholders have been given authority that otherwise belongs to the directors. This is essentially identical to Revised §

Although such authorization was implicit in the 1962 Act, most lawyers and the Secretary of State took the position that a board of directors was required for all corporations even if all the powers of the board had been given to the shareholders.⁴⁸ Requiring a nominal board of directors for a closely held corporation in which most of the shareholders are full-time employees

33-11-220(e), which was not changed by the 1981 Act. Because it is possible under the 1981 Act to have a Revised § 33-11-220 agreement and retain a board of directors, Revised § 33-11-220(f) should be amended to clarify the liabilities of the directors and shareholders in this circumstance. A provision entitling any shareholder who is liable for exercising the powers of a director to indemnification on the same basis as a director under Revised § 33-13-180 would also be advisable. Finally, Revised § 33-11-220(b) should also be amended to specify that a shareholder management agreement can eliminate, as well as restrict, the powers of a board of directors.

Another troublesome change is contained in Revised § 33-11-220(d), which requires that "[t]he text of a *summary* of any agreement authorized by this section shall be conspicuously *on the face of every certificate for shares* issued by the corporation. . . ." Revised § 33-11-220(d) (emphasis added). The 1962 Act required that "[t]he text . . . shall be set forth in full, or a *clear reference* shall be made to the agreement, *upon the face or back of each certificate for shares* issued by the corporation." § 33-11-220 (1976)(emphasis added). Most shareholder management agreements cover almost every aspect of the corporation's management and the shareholders' relative rights and responsibilities. A summary of every major topic covered by the agreement could be quite lengthy. A "reference" to the agreement, however, presumably requires only a statement that the shareholders have a § 33-11-220 shareholder management agreement. Even if the two terms can be construed to mean the same thing, a requirement that the "summary" be placed only on the face of the stock certificates is illogical. Compliance with Revised § 33-11-220(d) apparently requires that special stock certificates be prepared for any close corporation having a shareholder management agreement. This requirement is also inconsistent with Revised § 33-21-130(d), which authorizes a provision in the articles of incorporation giving one or more shareholders the power to dissolve the corporation and requires that the text of the provision or a "clear reference" thereto be placed on the *back* of the certificate. Because both Revised §§ 33-11-220 and 33-21-130 are specifically designed for use by close corporations and shareholders will frequently want both types of agreements to apply, the statutory requirements of both sections should be consistent. In addition, Revised § 33-11-220(c) states that a shareholder management agreement "shall be valid only so long as shares of the corporation are not traded on any over-the-counter market maintained by one or more brokers or dealers in securities." Revised § 33-21-130(b), however, states that the special dissolution right is valid unless the shares of the corporation are listed on a national securities exchange. This inconsistency, which did not exist under the 1962 Act, should also be eliminated.

48. The Secretary of State's position was based on § 33-7-40 (1976), which requires that before filing articles of incorporation, the Secretary of State shall determine that they contain the information required in § 33-7-30 (1976). The 1962 Act required that the articles contain the names and addresses of the initial directors. § 33-7-30(a)(5) (1976). According to the Corporate Division of the Office of the Secretary of State, unless the directors were named, the articles did not comply with the statutory requirements and therefore could not be filed. The 1981 Act appropriately amends § 33-7-30 to overcome this objection. See Revised § 33-7-30(a)(5).

of the business runs contrary to the informal operating style of management that normally exists among such shareholders. As amended, section 33-11-220 allows the shareholders of a corporation maximum flexibility to have a management and corporate structure that best fits their needs. Whether this option will be used more frequently than in the past, however, remains to be seen.⁴⁹

A second significant change in the close corporation provisions is the elimination of the ten-year maximum period for irrevocable proxies,⁵⁰ frequently used as a means of enforcing a shareholder voting agreement. Unfortunately, the 1981 Act did not eliminate the ten-year limit on shareholder voting agreements.⁵¹ Because an irrevocable proxy and a shareholder voting agreement serve the same basic purpose, the elimination of a time limitation solely for irrevocable proxies is inexplicable. Furthermore, the 1981 Act retains the ten-year limit on voting

49. Some of the statutory problems of this section are discussed in note 47 *supra*. See also note 54 *infra*. See generally F. O'NEAL, *supra* note 23, § 5.01-39. Available evidence indicates that very few corporations elect to have the type of flexible shareholder management agreement authorized by Revised § 33-11-220 and similar statutes in other states. See Blunk, *Analyzing Texas Articles of Incorporation: Is the Statutory Close Corporation Format Viable?*, 34 S.W.L.J. 941, 955-56 (1980). In fact, apparently none of the special control distribution devices that can be authorized by special provision in the articles of incorporation are widely used. *Id.* A survey of South Carolina articles of incorporation filed in 1967 and 1977, conducted in 1978-79 by William Rambaum, who at the time was the author's research assistant, revealed that only 26.8% of all corporations filing articles of incorporation during those two years contained any optional provisions. Of these, only a handful (none of 303 1967 forms surveyed and 14 of 597 1977 forms) authorized § 33-11-220 shareholder management agreements.

One unanticipated result of this survey was the discovery that a high percentage of all the forms in the sample contained one or more errors, many of which were patently obvious. For example, almost 14% of the forms contained errors in item 4 of the South Carolina articles of incorporation form, which requires information about capital structure. A very large number of the sampled forms also contained inappropriate or unnecessary language. For example, clauses containing long lists of corporate powers were common. *But see* Revised § 33-3-20(c), which is unchanged from the 1962 Act. Moreover, 37 of the 597 1977 forms surveyed stated that the corporation was issuing § 1244 stock, and 28 of the 1977 forms stated that the corporation was a Subchapter S corporation. While most of the erroneous provisions that were discovered constitute harmless error, the survey indicates at minimum a need for more knowledge of the corporate statutes and more care in preparation of articles of incorporation. *But cf.* Revised § 33-7-30(d) (attorney licensed to practice in South Carolina must sign the articles of incorporation).

50. § 33-11-140(g) (1976), which set out the ten-year limitation, has been omitted in the 1981 Act.

51. § 33-11-150 (1976), which contained the ten-year limit on shareholder agreements, was not changed by the 1981 Act. *See* Revised § 33-11-150.

trusts⁵² and on section 33-11-220 shareholder management agreements.⁵³ Limiting these agreements to ten years substantially restricts their usefulness. In many situations the need for agreements to protect the rights of minority shareholders may be greatest at the time these agreements are ready to expire, but, because of tension and disagreement between the shareholders, negotiation of an acceptable new agreement may be impossible.⁵⁴ The dangers of an agreement not restricted by a statutory time limit can be minimized by providing for arbitration of disputes, a buy-out of dissatisfied shareholders, or some other equitable remedy.⁵⁵

Revisions were also made with respect to the dissenters' rights provisions,⁵⁶ which broaden significantly the number of situations in which appraisal rights are authorized and make several needed procedural reforms. One change that may prove useful to close corporations is the authorization of dissenters' rights in any situation specified in the articles of incorporation.⁵⁷ Pursuant to this provision, dissenters' rights, which give the shareholder the right to the appraised fair market value of his shares, can be triggered when a shareholder dies or retires from the company if appropriate language is included in the articles.⁵⁸

52. Revised § 33-11-160. The 1981 Act made several minor changes in this section. Compare § 33-11-160 (1976).

53. Revised § 33-11-220(b)(3).

54. See F. O'NEAL, *OPPRESSION OF MINORITY SHAREHOLDERS* ¶ 9.02, at 579-80 (1975); Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation*, 54 GEO. L.J. 1145, 1173 (1966). Assuming the ten-year limitation is retained, Revised § 33-11-220(b)(3) should be revised so that it expressly states that a shareholder management agreement can be renewed for an unlimited number of additional periods. This is the case with voting agreements and voting trusts. See Revised §§ 33-11-150, -160(d). As it now reads, Revised § 33-11-220 can be interpreted as allowing only one ten-year renewal.

55. See generally F. O'NEAL, *supra* note 23, § 5.01-39.

56. The basic section is Revised § 33-11-270. See also Revised §§ 33-15-10(d), -17-90, -19-50. See Adams, *supra* note 3, at 410-11.

57. Revised § 33-11-270(a).

58. The usual way to implement a purchase of shares is through a buy-out contract, which usually contains a price or formula for determining the price of the stock. See generally F. O'NEAL, *supra* note 23, § 7.09-.25. A buy-out keyed to the dissenters' rights provisions would result in a court-determined price fully payable in cash unless the parties could voluntarily agree on the price and terms of payment. These differences should be kept in mind when considering whether to use dissenters' rights as the basis of a buy-out. Perhaps the appraisal proceedings in the dissenters' rights statute would be most useful as a fail-safe mechanism to deal with situations when the price formula in a buy-out contract is inoperative.

An additional significant change concerns cumulative voting rights for directors. Under the 1981 Act, the articles of incorporation may contain a provision abrogating cumulative voting rights.⁵⁹ The 1962 Act made cumulative voting mandatory in all cases.⁶⁰ Although this change represents a sharp break with past history, it will not have a materially adverse effect on the rights of minority shareholders. Cumulative voting remains applicable unless the articles otherwise provide, and other control distribution devices—such as the issuance of different classes of voting common stock, supermajority voting requirements, voting agreements, and contracts between the shareholders—can provide minority shareholders with at least as much protection as is provided by cumulative voting.⁶¹ Moreover, because of its complexity and the ability of the majority to circumvent it, cumulative voting is often an ineffective means of protecting minority shareholders.⁶² As a result, many South Carolina close corporations may elect not to have cumulative voting because it might interfere with the control arrangements they have established by other available means.

Other changes made in the 1981 Act that have an impact on the operation of close corporations include (1) elimination of the requirement that a corporation have paid-in capital of \$1,000, \$500 of which must be in cash;⁶³ (2) a new provision permitting any corporation to have only one director;⁶⁴ (3) a new rule au-

59. Revised § 33-11-200. The South Carolina constitutional provision requiring mandatory cumulative voting was eliminated when revised S.C. CONST. art. 9 was adopted in 1970. The revision follows one of two recommended cumulative voting alternatives in § 33 of the Model Act. The other alternative allows cumulative voting only if the articles of incorporation expressly authorize it.

60. § 33-11-200 (1976).

61. See generally F. O'NEAL, *supra* note 23, §§ 4.01-6.16. At most, cumulative voting gives minority shareholders holding a substantial number of shares some representation on the board of directors. Shareholders holding a majority of the shares can still elect a majority of the directors and can outvote the minority on any action requiring shareholder approval.

62. See F. O'NEAL, *supra* note 54, § 6.03; Comment, *Cumulative Voting—Removal, Reduction and Classification of Corporate Boards*, 22 U. CHI. L. REV. 751 (1955).

63. This requirement was previously contained in § 33-7-60(a)(2) (1976). See also § 33-7-30(a)(6) (1976). Neither the 1981 Act nor the Model Act contains a minimum capital requirement. The 1962 Act requirement was so minimal that it served no useful purpose.

64. Revised § 33-13-30. The 1962 Act required a minimum of three directors unless the corporation had fewer than three shareholders, in which case the number of directors had to equal the number of shareholders. § 33-13-30(a) (1976).

thorizing a corporate officer to act in more than one capacity;⁶⁵ (4) authorization of directors' meetings by telephone conference calls;⁶⁶ (5) amendments that clarify the provisions authorizing shareholder and director consent minutes;⁶⁷ (6) several revisions in the statutes that set out voting requirements for approval of fundamental changes in the corporation,⁶⁸ and (7) a provision stating that if a corporation has the requisite surplus at the time an installment redemption agreement is effective, the redemption is valid, provided the corporation is not insolvent, even if the corporation does not have sufficient surplus to cover the redemption at the time payments are made under the redemption agreement.⁶⁹

One serious omission in the 1981 Act is its failure to include a provision expressly validating share transfer restrictions designed to prevent ownership of shares by persons who are unacceptable to the remaining shareholders.⁷⁰ Because transfer restriction agreements among shareholders are quite common in close corporations and because such agreements have encoun-

65. Revised § 33-13-130(d). The 1962 Act prohibited one officer from acting in more than one capacity when action by two or more officers was required. § 33-13-130(e) (1976). The change will be particularly beneficial to corporations owned and managed by a single shareholder.

66. Revised § 33-13-80(c).

67. Revised §§ 33-11-180(b), -13-120(b), (e). The overlap in subsections (b) and (e) in Revised § 33-13-120 should be eliminated. Consideration should also be given to amending both sections to make it clear that the requisite signatures can appear on more than one document. See DEL. CODE ANN. tit. 8, §§ 141(f), 228 (1976). As presently worded, these sections can be interpreted to require that all signatures on consent minutes appear on a single document. This interpretation may well delay the effectiveness of the minutes and in some cases may be impracticable.

68. See note 6 *supra*. While supermajority voting rights are widely used in close corporations as a means of protecting minority shareholders, they are also frequently used as a means of protecting the controlling shareholders from a hostile takeover bid. See Black & Smith, *Anti-takeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699, 713-15 (1979).

69. Revised § 33-9-180(f). The 1962 Act could be interpreted as requiring the corporation to have the requisite surplus both at the time the obligation was incurred and the time each payment is made. The latter rule applies with respect to the insolvency test that must also be met, which is unchanged by the 1981 Act. Compare § 33-9-180(c) (1976) with Revised § 33-9-180(c). The new provision dealing with the surplus test is consistent with the interpretation of language similar to the 1962 Act contained in the recently repealed Model Act financial provisions discussed at notes 13-29 and accompanying text *supra*. See Herwitz, *Installment Repurchase of Stock: Surplus Limitations*, 79 HARV. L. REV. 303, 313-14 (1965). Thus, Revised § 33-9-180(f) essentially represents a clarification rather than a change in the prior law.

70. See 2 F. O'NEAL, *supra* note 23, § 7.02.

tered legal problems in many other states,⁷¹ the absence of any substantial case law in South Carolina clearly upholding the validity of the most usual types of transfer restrictions is a cause for some concern.⁷² Enactment of a statute similar to section 202 of the Delaware Business Corporation Act⁷³ would eliminate this concern. The Delaware statute validates first refusal and consent restrictions, mandatory buy-out restrictions, restrictions prohibiting transfer to designated persons or classes of persons if the restrictions are not manifestly unreasonable, and restrictions prohibiting transfers that cause the corporation to lose its Subchapter S status.⁷⁴

B. Statutory Close Corporations

When the close corporation provisions in the South Carolina Business Corporation Act are again reviewed, the Close Corporation Supplement to the Model Business Corporation Act (the Supplement), which has recently received tentative approval,⁷⁵

71. See *id.* § 7.05-.05(a); Bradley, *Stock Transfer Restrictions and Buy-Sell Agreements*, 1969 U. ILL. L.F. 139.

72. The only South Carolina decision interpreting share restrictions is *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 216 S.E.2d 746 (1975), which concerned the construction of a first refusal option given to the corporation in the event the shares were offered for sale. The majority refused to enforce the restriction on the ground that the transfer in question constituted a gift and the restriction only covered voluntary sales and stated:

Shares of corporate stock are regarded as property, and the owner of such shares may, as a general rule, dispose of them as he sees fit, unless his right to do so is properly restricted. A restriction expressed only as one on sale, the right to sell, or the like, is generally construed narrowly as applicable only to sales and not to mere transfers.

Id. at 7, 216 S.E.2d at 748. The court cited no cases as authority for these statements.

73. DEL. CODE ANN. tit. 8, § 202 (1976).

74. *Id.* § 202(d). In addition, § 202(e) validates "[a]ny other lawful restriction on transfer or registration of transfer of securities."

75. MODEL BUS. CORP. ACT, Close Corp. Supp. (Draft 1981) [hereinafter cited as Supplement] has received approval on second reading from the American Bar Association Committee on Corporate Laws, which authorizes all changes in the Model Act, and was published in the November 1981 issue of *Business Lawyer*. See Committee on Corporate Laws, *Proposed Statutory Close Corporation Amendments to the Model Business Corporation Act*, 37 BUS. LAW. 269 (1981). After changes suggested by comments received from the publication in *Business Lawyer* are made, the Supplement will be considered for third and final reading and, if approved, will become part of the Model Act.

The author of this article is a special consultant to the Committee on Corporate Laws and under the supervision of the Close Corporation Subcommittee has conducted legal research and prepared the various drafts of the Supplement.

should be studied for possible enactment. The Supplement authorizes a new type of corporation known as a "statutory close corporation." Any corporation having fewer than fifty shareholders may elect statutory close corporation status.⁷⁶ The only requirement for election is a statement in the articles of incorporation that the corporation is a statutory close corporation.⁷⁷

The shareholders can choose any form of management and voting structure they wish and the power to operate without a board of directors is expressly authorized.⁷⁸ A provision in the articles of incorporation authorizing one or more shareholders to dissolve the corporation is also authorized.⁷⁹ No bylaws are necessary if the information required by statute to be included in the bylaws is contained in the articles of incorporation or in a shareholder agreement.⁸⁰

The shares of a statutory close corporation are automatically subject to consent transfer restrictions.⁸¹ Intrafamily, intrashareholder, and certain other types of transfers, however, are exempt.⁸² In addition, shares may be sold to a third party who makes a cash offer for the shares, subject to a first-refusal purchase right by the corporation and the other shareholders.⁸³ The statutory restrictions may be altered or deleted entirely by appropriate language in the articles of incorporation.⁸⁴ The Supplement also contains an elective provision that authorizes the purchase of the shares of a deceased shareholder by the corporation and other shareholders and sets out detailed procedures for consummating the purchase.⁸⁵ The section can be expanded to cover other situations, such as retirement, when a buy-out may be desirable.⁸⁶

In addition, the Supplement contains a special remedial sec-

76. Supplement § 3.

77. *Id.* § 3(a).

78. *Id.* §§ 10, 11.

79. *Id.* § 15.

80. *Id.* § 12.

81. *Id.* § 4. The transfer restriction addressed in *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 216 S.E.2d 716 (1975), discussed at note 72 *supra*, would have been upheld had the Supplement been in effect.

82. Supplement § 4(b).

83. *Id.* § 4(c)-(g).

84. *Id.* § 4(a).

85. *Id.* § 14.

86. *Id.* § 14(b).

tion designed to provide relief from fraudulent, oppressive, and prejudicial conduct.⁸⁷ Courts are given broad discretion to grant any type of relief that will resolve disputes between the shareholders. To discourage strike suits, a judge is authorized to assess attorneys' fees, experts' fees, and other reasonable expenses against any party who has acted vexatiously or in bad faith.⁸⁸ This section is similar to sections 33-21-150 and 33-21-155 of the 1981 Act.⁸⁹

Election to become a statutory close corporation is voluntary and can be terminated by amending the articles of incorporation to delete the statement that the corporation is a statutory close corporation.⁹⁰ Moreover, the Supplement does not affect

87. *Id.* § 16.

88. *Id.* § 16(c).

89. Revised §§ 33-21-150 and -155 are discussed at notes 43-45 and accompanying text *supra*. Under the Supplement, dissolution of the corporation is appropriate only if no other remedy resolves the dispute. Supplement § 16. Under the 1981 Act, however, the plaintiff files the action as one seeking dissolution of the corporation, and "the court may make such order to grant such relief, other than dissolution, as in its discretion it deems appropriate." Revised § 33-21-155(a). A second major difference concerns the types of plaintiffs who can bring an action for relief. The South Carolina statute allows only shareholders, who are limited by definition to holders of record of fully paid and nonassessable shares, and directors to file such a suit. Revised §§ 33-1-20(21), -21-150(a), -155(a). The Supplement, however, allows beneficial owners of shares held by a nominee and holders of voting trust certificates as well as shareholders of record to file such suits. Supplement § 16(a). The South Carolina Code provision seems unduly restrictive. A voting trust beneficiary, for example, could not bring an action under Revised § 33-21-150 if the trustee refused to do so, even though the trustee may be the source of the complaint. The beneficiary could bring an action to rescind the voting trust, and if successful, could then bring an action under Revised § 33-21-150. This procedure, however, is unnecessarily complex and expensive. Meritless suits can be effectively controlled by authorizing the court to assess attorneys' fees and other costs. *See* Supplement § 16(c). A third difference is that the relief a court may grant under the Supplement is somewhat broader than under the 1981 Act. For example, the Supplement expressly authorizes the appointment of a provisional director as well as a custodian, whose job is to preserve the business as a going concern. Supplement § 16(b)(6), (7). The Supplement also authorizes the award of damages in addition to or in lieu of any equitable relief. Supplement § 16(a)(11). *Cf. McLeod v. Stevens*, 617 F.2d 1038 (4th Cir. 1980) (damages denied to minority shareholders granted equitable relief due to election of remedies).

90. Supplement §§ 8, 9. If the terminating corporation has no board of directors, it must elect a board; and the articles must be further amended to specify the number, names, and addresses of the directors. In addition, bylaws must be adopted if the corporation has no bylaws at the time of termination. Section 9 also provides that the termination does not affect the rights of a shareholder under an agreement between the shareholders or with the corporation or any special rights given the shareholder in the articles of incorporation except when the right is invalid under the general business corporation act, which automatically governs the terminating corporation, or other laws of the state

the provisions that exist in South Carolina and most other states authorizing shareholder voting agreements and voting trusts, irrevocable proxies, class voting rights and supermajority quorum and voting requirements,⁹¹ which are frequently used in corporations that are not closely held. Consequently, a wide range of control distribution devices designed to protect minority shareholders remains available to a closely held corporation that does not elect to become a statutory close corporation. The principal advantages of election under the Model Act are: (1) greater management flexibility; (2) broader remedies to protect minority shareholders against oppression; and (3) less cumbersome drafting of standard agreements commonly used in close corporations.⁹²

III. THE NEED FOR A JOINT LEGISLATIVE STUDY COMMITTEE

The 1981 Act accomplished a major overhaul of the South Carolina Business Corporation Act. Although it presents a number of technical, drafting, and interpretive problems⁹³ and some regrettable omissions,⁹⁴ the revised Act clearly represents a major legislative accomplishment. The Business Corporation Act is, however, only one of many interrelated statutes that provide the legal framework for businesses operating in this state. Changes in one of these statutes frequently necessitate revisions in one or more related statutes, but these relationships are all too often overlooked.⁹⁵

of incorporation. Finally, shareholders voting against the termination are given dissenters' rights. *Id.* § 9.

91. See generally notes 50-55 & 68 and accompanying text *supra*.

92. Enactment of the Supplement would be relatively simple to achieve. Only three existing statutes, Revised §§ 33-11-220 (authorizing unanimous shareholder management agreements), 33-21-130 (allowing a provision in the articles of incorporation giving one or more shareholders the power to dissolve the corporation), and 33-21-155 (specifying the relief in lieu of dissolution that a court can grant in a dissolution suit), would have to be repealed. The subject matter of all three statutes is covered in the Supplement. See Supplement §§ 10, 11, 15 & 16.

93. See notes 6, 47, 51-54 & 67 and accompanying text *supra*.

94. See notes 13-29 & 70-74 and accompanying text *supra*.

95. For example, the 1981 Act allows a South Carolina corporation whose securities are listed on a national securities exchange to dispense with issuance of share certificates. Revised § 33-9-110(e). In such cases, stock records are computerized and statements are issued acknowledging the ownership rights of a shareholder and anyone, such as a pledgee, claiming an interest in the shares. See U.C.C. § 8-408 (1978 version). See generally *Special Project—Uncertificated Securities, Articles 8 and 9 of the U.C.C. and the*

Moreover, all too frequently, important, innovative proposed legislation is not brought to the attention of the legislature because legislative reform in the business and commercial area has traditionally been handled on an ad hoc individual project basis. In some cases the South Carolina Judicial Council has provided funds for a particular project,⁹⁶ and on a few occasions the legislature has approved a special appropriation to finance a study of proposed legislation.⁹⁷ In other instances, private industry has provided necessary funding for the research and drafting of major business legislation,⁹⁸ or the research has been conducted on a voluntary, nonfunded basis by the South Carolina Bar.

South Carolina urgently needs a more systematic, comprehensive approach to conducting research and making legislative recommendations not only for further revision of the Business Corporation Act but for changes in all other state statutes affecting business and commerce. One possibility is the creation of a joint legislative study committee of lay members with business

Texas Business Corporation Act: A New System to Accommodate Modern Securities Transactions, 11 TEX. TECH. L. REV. 813, 824-27 (1980). In order for this certificateless system to operate effectively, changes in U.C.C. articles 8 and 9 are necessary. See U.C.C., Reporter's Introductory Comment to 1978 Official Text Showing Changes Made in Former Text of Article 8 Investment Securities and in Related Sections and Reasons for Changes, which points out that the majority of changes in revised article 8 accommodate uncertificated securities. Eight sections of article 9 were also amended to deal with security interests in uncertificated securities. See U.C.C. §§ 9-103, -105, -203, -302, -304, -305, -309, -312 (1978 version). Minor changes were also made in U.C.C. §§ 1-201 and 5-114. See generally Aronstein, *A Certificateless Article 8? Can We Have it Both Ways?*, 31 BUS. LAW. 729 (1976). These revisions, however, were not included in the legislative package of revisions to the South Carolina Business Corporation Act, and no legislative or bar committee is currently studying this problem. A study of the 1972 revisions to article 9 was made, and a report recommending the adoption of revised article 9 was approved by the South Carolina Judicial Council in 1979, but the article 9 amendments relating to uncertificated securities were not included in the study.

96. The research necessary to prepare the Uniform Commercial Code for adoption in South Carolina was financed through a legislative grant to the South Carolina Judicial Council. A study of the 1972 amendments to Article 9 of the U.C.C. was also financed through the Judicial Council.

97. The study and drafting of the 1981 Act was financed in part by such an appropriation. See 1977 S.C. Acts 506, No. 193. Research funds for the initial work on the 1981 Act were provided through the Judicial Council.

98. A study of proposed legislation to revise the South Carolina credit statutes, introduced in the 1981 Legislative Session as H. 2440, was financed by the Coalition of Lenders and Creditors, an ad hoc group formed by major South Carolina creditors.

and commercial law expertise,⁹⁹ which would be responsible for making recommendations to the legislature on an annual basis.¹⁰⁰ In addition to proposing statutory language, the committee should summarize any research conducted on proposed legis-

99. A Law Reform Commission with authority to sponsor research and draft proposed legislation in all areas is the ideal solution. Several states have such commissions. If a Commission were established in South Carolina, the study committee approach advocated in this article would be unnecessary. Past history, budgetary constraints, and political concerns make it unlikely, however, that such a commission will be created by the South Carolina Legislature in the near future.

The South Carolina Judicial Council, which has legislative, judicial, and lay members, has in the past sponsored studies of some business and commercial legislation, most notably the 1962 and 1981 Business Corporation Acts and the Uniform Commercial Code. See notes 96 & 97 *supra*. In recent years, however, the law reform activities of the Judicial Council have been rather dormant. Unless the statute setting out its authority is amended, however, even a reactivated Judicial Council would be required to concentrate its energies on the administration and operation of the South Carolina courts. See S.C. CODE ANN. § 14-27-70 (1976). The South Carolina Legislative Council is authorized to undertake research and draft legislation when requested to do so by a legislative committee or by a member of the legislature. S.C. CODE ANN. § 2-11-50 (1976). The Legislative Council, whose membership consists of various legislative officers, is, however, too occupied with its normal research and drafting responsibilities to undertake the additional responsibilities envisioned for the study committee proposed in this article.

The Joint Study Committee on Consumer Affairs, which is the successor to the Joint Legislative Uniform Consumer Credit Code Study Committee established in 1969, has three lay members appointed by the Governor, three members from the House of Representatives appointed by the Speaker, and three members from the South Carolina Senate appointed by the President of the Senate. See H. 1291, 1969 S.C. HOUSE J. 1904-05; 1969 S.C. SEN. J. 1965-66. Although this Committee only reviews proposed consumer protection and credit legislation, it might serve as a model for the joint legislative study committee proposed in this article.

It might also be possible by special legislation to expand the jurisdiction and membership of the Joint Legislative Committee to Study the South Carolina Business Corporation Act to perform the broader functions suggested in the text. This committee, created in 1979, is comprised of three House members, three Senate members, three members appointed by the Governor, and the Chairman of the South Carolina Bar's Corporation Law Revision Committee.

The South Carolina Commissioners on Uniform State Laws should be included as members, or at least *ex officio* members of any such legislative study committee. Under Article 5.1(4) of the Constitution and By-Laws of the National Conference of Commissioners on Uniform State Laws, the Commissioners have the duty "to endeavor to secure the enactment of legislation" approved by the Conference. HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 259 (1979). The South Carolina Commissioners have traditionally not sought to introduce, on a unilateral basis, any of the Uniform Acts, perhaps because of the absence of any institutional framework encouraging them to do so.

100. Use of one or more of the existing legislative committees in lieu of the proposed study committee is not practical because various legislative proposals likely to be considered may transcend the jurisdiction of any single committee.

lation and, where appropriate, submit explanatory notes—often called Reporter's Notes—designed to provide guidance for the legislature in a highly technical area.¹⁰¹ Because South Carolina has no recorded legislative history,¹⁰² these Reporter's Notes might also be used as the basis for official comments published with the statutes in the South Carolina Code. Although not part of the statutory law, comments can be helpful to practitioners and courts in determining the intent of a particular provision and its relation to other applicable sections of the statute.¹⁰³

In order to perform its functions effectively, the proposed committee might retain one or more special reporters or consultants to conduct the research and drafting for each major project. The committee should also be authorized to appoint for each project an advisory committee of persons who have an interest in the proposed legislation. This approach has been used successfully by the American Law Institute and the Commissioners on Uniform State Laws.¹⁰⁴ It minimizes the expenses of the Committee and avoids the problems attending a large per-

101. Most business and commercial legislation is highly technical, and the background research and explanatory notes can be quite helpful to legislators who may not have expertise in this area.

102. As a general rule, House and Senate Journals contain only the actual statutory language, the text of proposed amendments, and the voting record. Written committee reports are introduced on rare occasions. Oral discussion, however, is not printed.

103. Publication of official comments to uniform and model acts such as those accompanying the U.C.C. have proved very useful. For a discussion of the purpose and proper use of the Comments to the Uniform Commercial Code, see E. FARNSWORTH & J. HONNOLD, *COMMERCIAL LAW* 8-10 (3d ed. 1976); *SOUTH CAROLINA CONSUMER PROTECTION CODE—1979 TEXT WITH COMMENTS*, § 37-1-101, Comment 2 (1979). Reporter's Notes to the 1962 South Carolina Business Corporation Act, prepared by Professor Ernest L. Folk, III, were published as a joint venture between the Joint Committee of the General Assembly to Investigate the Feasibility of Revising the Laws of this State Relating to Corporations and Securities and the South Carolina Judicial Council. *SOUTH CAROLINA BUSINESS CORPORATION ACT* (Ann. ed. 1964). These Reporter's Notes contain valuable background information on each section, including the differences from parallel sections of the Model Act and prior South Carolina cases and statutes. Regrettably, these Reporter's Notes were not included in the South Carolina Code. Apparently, no Reporter's Notes will be printed with the official Code version of the 1981 South Carolina Business Corporation Act, although extensive comments were included in the Suggestions for Revision to the South Carolina Business Corporation Act of 1962 prepared by Dean J. Kirkland Grant. The South Carolina Bar has retained Dean Grant to prepare a South Carolina Corporate Practice Manual. Nevertheless, Reporter's Notes published with the 1981 Act in the South Carolina Code would be a valuable additional resource.

104. *HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS* 253 (1976); *PROCEEDINGS, 56TH ANNUAL MEETING—THE AMERICAN LAW INSTITUTE* 1971, at 722 (1980).

manent staff. Because the legislature is naturally reluctant to vote for complex, technical statutes when it is generally unfamiliar with the issues addressed, inclusion on the Committee of legislators from both houses is essential. This membership would provide the added assurance of recommendation by respected colleagues after careful study.¹⁰⁵

Numerous projects are available for consideration by the joint legislative study committee proposed here. Among proposals that merit immediate and careful attention are the following:

(1) A technical amendments act is needed to correct minor drafting and interpretive errors in the 1981 Act.¹⁰⁶ This act should also include the new Model Act's financial provisions¹⁰⁷ and other revisions suggested in this article.¹⁰⁸

105. Legislators' thorough familiarity with proposed legislation also reduces the chance of enactment of well-intentioned but ill-designed amendments. See Note, *South Carolina Amendments to Article 2 of the Uniform Commercial Code*, 21 S.C.L. REV. 400 (1969).

106. The preparation of such a bill is already underway. See Roberts, *supra* note 12, at 401.

107. See notes 13-29 and accompanying text *supra*.

108. See notes 6, 11, 47, 51-54, 67 & 70-74 and accompanying text *supra*. The following additional amendments should be considered in a technical amendments act:

(1) Revised § 33-7-30(b)(4), relating to preemptive rights, should be repealed. This section is inconsistent with Revised § 33-11-210(a). See also Revised § 33-15-10(a)(11).

(2) Revised § 33-13-30(b), dealing with changes in the number of directors, should be revised. Language in the 1981 Act creates ambiguities that did not exist under the 1962 Act. For example, it is now unclear who has the power to decrease the number of directors. In addition, instead of shareholders having the primary authority to increase the number of directors, the 1981 Act gives this authority to the existing directors "unless otherwise provided in the articles or bylaws." The directors representing majority shareholders could use their authority under this provision to dilute the voting power of minority shareholder directors. This appears to be an undesirable trap for the unwary.

(3) Revised § 33-13-70(c) should be either repealed or revised. The provision gives directors the power to remove fellow directors and is inconsistent with other provisions that seem to give shareholders the exclusive power to remove directors. The provision also leaves unclear the number of directors' votes needed for approval of a motion to remove a director.

(4) Section 33-23-150 (1976), which set out the penalties for foreign corporations' doing business in this state without proper qualification, should be reenacted. This section was not included in the 1981 Act, and the subject matter is not included in any other section.

(5) Revised §§ 33-11-250 and 33-11-260, which identify the books and records that must be kept at the corporation's principal place of business or registered office and the shareholder's right to inspect such books, need extensive revision to be more consistent with MODEL ACT § 52, particularly with respect to the types of records that are subject to inspection and the penalties for improper refusal to allow inspection and copying. In addition, these sections presently appear to authorize the corporation to refuse for any

(2) The Model Act is now undergoing a complete revision, and publication of the new edition is due during the summer of 1982.¹⁰⁹ In addition to redrafting the entire Model Act in the style of the uniform acts promulgated by the National Conference of Commissioners on Uniform State Laws, the revision will contain significant substantive changes¹¹⁰ and should trigger a thorough review of business corporation acts in all states.¹¹¹

reason a shareholder's request for inspecting, thereby forcing the shareholder to bring a court action to compel inspection. The 1962 Act authorized a refusal only if the shareholder failed to file an affidavit stating a legitimate corporate purpose for the request. See § 33-11-250(c)(1976).

(6) Revised § 33-11-150, which authorizes voting agreements between two or more shareholders, and Revised § 33-11-220, which authorizes shareholder management agreements by unanimous consent of shareholders, should be amended to include language similar to Revised § 33-11-60(e), validating such agreements for ten years even though, by their terms, they extend beyond ten years. As the provisions are presently worded, voting agreements and shareholder management agreements may be held invalid *ab initio* if the expressed term is greater than ten years.

109. Interview with Seth S. Searcy, III, Project Director, Model Business Corporation Act Project (by telephone July 28, 1981).

110. One major substantive change that has received tentative approval is the elimination of the prohibition in MODEL ACT § 19 against issuing stock for notes or future services. Most states, including South Carolina, have statutes that follow the existing Model Act rule. See § 33-9-80 (1976). The 1981 Act made only a minor amendment to this section to allow stock to be issued by a parent corporation for services rendered or property transferred to a subsidiary. See Revised § 33-9-80. At least three states—Michigan, Minnesota, and Virginia—have already enacted legislation similar to the proposed revision in MODEL ACT § 19. See MICH. COMP. LAWS ANN. § 450.1315 (1973); MINN. STAT. ANN. § 302A.551 (Supp. 1981); VA. CODE § 13.1-17 (1978). The requirement that shares can only be issued for property or past services grew out of a fear of watered stock. Most authorities agree, however, that restrictions on stock consideration are easily evaded and that more effective ways of minimizing the danger of watered stock are available. See, e.g., W. CARY & M. EISENBERG, *supra* note 9, at 1034-64; Israels, *Problems of Par and No-Par Shares: A Reappraisal*, 47 COLUM. L. REV. 1279 (1947). In addition, the inability to issue stock for notes or future services can cause serious capitalization problems in a close corporation, particularly one in which some investors contribute entrepreneurial skills but little or no capital and other investors contribute the bulk of the capital. See Herwitz, *Allocation of Stock Between Services and Capital in the Organization of a Close Corporation*, 75 HARV. L. REV. 1098 (1962).

111. Changes in the corporation statutes of other states should also be reviewed on a regular basis for useful and innovative concepts that are not included in the Model Act. The new Minnesota Business Corporation Act, MINN. STAT. ANN. ch. 302A (Supp. 1981), for example, contains several innovative features. Section 7 of the Minnesota Act requires only four basic items in the articles of incorporation: the corporate name, address of the registered office, number of authorized shares, and name and address of each incorporator. *Id.* § 7. The Act also sets forth a laundry list of provisions that automatically apply unless modified in the articles of incorporation. For example, unless the articles of incorporation state otherwise, all shares are common voting shares with equal rights and preferences and have a par value of one cent per share. *Id.* Subd. 2(h), (i), (j). The sim-

(3) The Close Corporation Supplement to the Model Act¹¹² should be carefully studied for recommendation to the legislature for adoption.

(4) The Professional Corporation Supplement to the Model Act¹¹³ contains a number of important provisions that are different from or omitted in the South Carolina Professional Association Act¹¹⁴ and should be considered as a basis for revising the South Carolina Act.¹¹⁵

plified incorporation process authorized by the new Minnesota Act will enable many corporations to file what in effect is a "postcard" articles of incorporation. The new statutory format in the Minnesota Act should also reduce the number of errors in articles of incorporation forms. See note 49 *supra*.

112. See notes 75-91 and accompanying text *supra*.

113. The text of the Professional Corporation Supplement to the Model Act [hereinafter cited as Prof. Corp. Supp.] is published in 32 BUS. LAW. 289 (1976).

114. S.C. CODE ANN. §§ 33-51-10 to -170 (1976).

115. For example, Prof. Corp. Supp. § 10 requires that, in the absence of an agreed buy-out price, the shares of a deceased or disqualified shareholder will be valued at their fair value, Prof. Corp. Supp. § 10, the same standard used in dissenters' rights statutes. See, e.g., MODEL ACT § 81; S.C. Revised § 33-11-270(d). The South Carolina Professional Corporation Act values the shares on the basis of their historic book value, S.C. CODE ANN. § 33-51-120 (1976), a figure that frequently is much lower than the fair value. In addition, the South Carolina Act, unlike the Prof. Corp. Supp. §§ 19-23, has no provision allowing a professional corporation incorporated in another state to qualify to conduct business in South Carolina. Consequently, a foreign professional corporation must incorporate de novo in South Carolina. 1977 Op. S.C. Att'y Gen. 298, No. 77-374. Moreover, the extent of personal liability for malpractice by other professionals in a South Carolina professional association needs clarification. See S.C. CODE ANN. § 33-51-70 (1976) ("This chapter does not modify any law applicable to the relationship between a person furnishing professional service and a person receiving such service, including liability arising out of the professional service . . ."). This provision appears to carry forward the standard of vicarious personal liability that exists in a partnership. See UNIFORM PARTNERSHIP ACT §§ 13-15; S.C. CODE ANN. §§ 33-41-350 to -370 (1976). Section 33-51-70, however, further states that:

[s]ubject to the foregoing provisions of this section, the members or shareholders of any professional association organized pursuant to the provisions of this chapter shall not be individually liable for the debts of, or claims against, the professional association unless such member or shareholder has *personally participated* in the transaction for which the debt or claim is made or out of which it arises.

Id. § 33-51-70 (emphasis added). This form of liability is much more restricted than that which exists in a partnership. The introductory phrase to this sentence makes it difficult to determine which standard applies.

Under § 11 of the Prof. Corp. Supp., each shareholder is individually liable for any professional negligence in which he personally participates. Section 11 offers three alternatives with respect to the personal liability of the remaining shareholders for the professional negligence of other shareholders or agents. Under the first alternative, the shareholders are insulated from such liability, as is the case in a regular business corporation. The second alternative provides that the shareholders are personally liable under

(5) If the proposed Federal Securities Code is enacted,¹¹⁶ the South Carolina version of the Uniform Securities Act¹¹⁷ should be reviewed and modernized. Even if Congress fails to adopt the Securities Code, recent changes in existing federal securities legislation and SEC rules, particularly the changes respecting exempt securities, have caused inconsistencies with the South Carolina Act that should be corrected.¹¹⁸

(6) The South Carolina nonprofit corporation statutes¹¹⁹ have antiquated¹²⁰ and incomplete provisions.¹²¹ Moreover, the

the partnership standard of tort liability. Under the third alternative, the other shareholders are relieved from personal liability if the professional corporation has malpractice insurance in the amount and with the coverage specified by the licensing authority for the profession.

116. ALI FEDERAL SECURITIES CODE (Proposed Official Draft 1978). Professor Louis Loss of Harvard Law School was the Reporter for this Code. The Securities and Exchange Commission issued a statement supporting enactment with modifications of the Securities Code in September 1980. See *Statement Concerning Codification of the Federal Securities Laws*, 20 SEC DOCKET 1483 (1980). See generally ALI *Proposed Federal Securities Code*, 34 BUS. LAW. 345 (1978); Cheek & Hawes, *The Federal Securities Code and its Effect on Existing United States Securities Regulation*, 2 J. COMP. CORP. L. & SEC. REG. 245 (1979).

117. S.C. CODE ANN. §§ 35-1-10 to -1590 (1976). The National Conference of Commissioners on Uniform State Laws, which promulgated the Uniform Securities Act, is in the process of obtaining a Reporter to revise this Act. Interview with John McCabe, Executive Director (by telephone Aug. 12, 1981). The North American Securities Administrators Association has also recently begun work on various revisions to the Uniform Act. See SEC. REG. & L. REP. (BNA) F-1, H-1 to -9 (July 8, 1981).

118. S.C. CODE ANN. § 35-1-320(9)(1976), provides a limited offering exemption when the offer is made to not more than twenty-five noninstitutional offerees. Securities and Exchange Commission Rule 146, however, has a numerical limitation of thirty-five individual purchasers. 17 C.F.R. § 230.146(g)(1) (1981). See generally Royalty & Jones, *The Private Placement Exemption and the Blue Sky Laws—Shoals in the Safe Harbor*, 33 WASH. & LEE L. REV. 877 (1976). Further revisions in the South Carolina Tender Offer Statute, Revised §§ 33-2-10 to -130, which replace 1978 S.C. Acts 1557, No. 531, may also be necessary. The United States Supreme Court will consider the conflict between state takeover-disclosure acts and the Williams Act for the first time in the October 1981 Term. *Mite Corp. v. Dixon*, 49 U.S.L.W. 3819 (1981). See generally Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733 (1979).

119. S.C. CODE ANN. §§ 33-31-10 to -450 (1976 & Supp. 1980) (general nonprofit corporation statute); 33-33-10 to -70 (1976) (church corporations); 33-35-10 to -170 (1976) (non-profit corporations financed by federal loans). See also S.C. CODE ANN. §§ 33-37-10 to -640 (1976) (South Carolina business development corporations); 33-39-10 to -640 (1976) (county business development corporations).

120. Newspaper publication of intent to incorporate or amend the Charter, for example, is required. S.C. CODE ANN. §§ 33-31-20, -130 (1976). No useful purpose is served by this requirement. See also S.C. CODE ANN. §§ 33-31-140 (1976) (newspaper notice of amendment of a corporation sole charter), -150 (1976) (dissolution by published notice or

ABA Model Non-Profit Corporation Act¹²² is being rewritten and a draft should be ready for publication sometime in 1982.¹²³ South Carolina should follow the lead of such states as California¹²⁴ and New York,¹²⁵ which have recently adopted extensive revisions of their nonprofit corporation statutes.

(7) A Revised Uniform Limited Partnership Act (Revised U.L.P.A.) has been approved for state adoption by the National Conference of Commissioners on Uniform State Laws.¹²⁶ The Revised U.L.P.A. contains many important provisions that are not included in the South Carolina Limited Partnership Act,¹²⁷ which is based on the 1916 U.L.P.A.¹²⁸ Furthermore, the Internal Revenue Service has now indicated that it will treat a lim-

written notice mailed to each member).

121. The relationship, if any, of the South Carolina Business Corporation Act to nonprofit corporations is not stated. In addition, no statutory provision states the standard of care for liability of directors or regulates self-dealing transactions between a nonprofit corporation and its officers and directors. See, e.g., CALIF. CORP. CODE §§ 9241, 9243, 9245, 9250 (West 1977 & Supp. 1981).

122. ABA MODEL NON-PROFIT CORPORATION ACT (1964).

123. Interview with Frank R. Morris, Chairman, American Bar Association Committee on Non-Profit Corporations, Columbus, Ohio (by telephone Aug. 4, 1981).

124. CALIF. CORP. CODE §§ 9000-10406 (West 1977 & Supp. 1981).

125. 37 NEW YORK NOT-FOR-PROFIT CORP. LAW §§ 101-1513 (McKinney 1970 & Supp. 1980).

126. The Revised UNIFORM LIMITED PARTNERSHIP ACT (U.L.P.A.) was approved in August 1976 by the National Conference of Commissioners on Uniform State Laws. It has been adopted in at least ten states—Arkansas, Colorado, Connecticut, Maryland, Minnesota, Montana, Nebraska, Washington, West Virginia, and Wyoming—and has been introduced in the legislatures of a number of additional states. See generally Kessler, *The New Uniform Limited Partnership Act: A Critique*, 48 *FORDHAM L. REV.* 159 (1979); *Symposium: Limited Partnership Act*, 9 *ST. MARY'S L.J.* 441 (1978).

127. S.C. CODE ANN. §§ 33-43-10 to -300 (1976).

128. The 1916 UNIFORM LIMITED PARTNERSHIP ACT has been adopted by every state but Louisiana. See 6 *UNIFORM LAWS ANN.* 111 (Supp. 1981). South Carolina enacted the 1916 U.L.P.A. in 1960. 1960 S.C. Acts 848, No. 51 (codified at S.C. CODE ANN. §§ 33-43-10 to -290 (1976)). Examples of Revised U.L.P.A. provisions not covered by the South Carolina Act include the right of a limited partnership to reserve a name, Revised U.L.P.A. § 103; registration of foreign limited partnerships, *id.* §§ 901-908; and procedures for derivative actions by limited partners, *id.* §§ 1001-1004. The Revised U.L.P.A. also deals more effectively with a number of issues that have caused problems under the 1916 Act. For example, the Revised U.L.P.A. provides a safe harbor "laundry list" of activities, including voting rights, in which a limited partner may engage without endangering his status. *Id.* § 303. Compare 1916 U.L.P.A. § 7 with S.C. CODE ANN. § 33-43-80 (1976). See Aslanides, Cardinali, Haynsworth, Lane & Niesar, *Limited Partnerships—What's Next and What's Left?*, 34 *BUS. LAW.* 257, 263-67 (1978). Moreover, the mechanics of filing and amending limited partnership certificates have been simplified. Revised U.L.P.A. §§ 201-209. See Aslanides, *et al.*, *supra*, at 268-69.

ited partnership formed under the Revised U.L.P.A. on the same basis as one formed under the 1916 U.L.P.A. for purposes of the tax classification regulations.¹²⁹

(8) The South Carolina Business Trust Statute¹³⁰ should be revised. Several amendments to this statute, which is used for real estate investment trusts and more recently for money trusts, were suggested in 1972¹³¹ but have not as yet been enacted.

(9) Articles 8 and 9 of the Uniform Commercial Code have been extensively revised.¹³² As a result of a thorough study, the South Carolina Judicial Council in 1979 recommended Revised Article 9 for adoption, but a bill has not yet been filed. A Revised Article 6 is nearing completion,¹³³ and Articles 3 and 4 are also being extensively revised.¹³⁴ In addition, a new U.C.C. article dealing with equipment leasing is under consideration.¹³⁵

129. See *Revision of Rules on Tax Classification of Limited Partnerships in Light of Certain Recent Legislative Developments*, 45 Fed. Reg. 70,909 (1980) (announcing proposed amendments to Treas. Reg. §§ 301.7701-2). See generally Haims & Strock, *Federal Income Tax Classification of Limited Partnerships Formed Under the Revised Uniform Limited Partnership Act*, 9 ST. MARY'S L.J. 489 (1978).

130. S.C. CODE ANN. §§ 33-53-10 to -50 (1976).

131. Wilkins & Moses, *Real Estate Investment Trusts in South Carolina*, 24 S.C.L. REV. 741, 745-48, 755-58 (1972).

132. Revised article 8, approved in 1977, has been adopted by at least three states. See CONN. GEN. STAT. ANN. §§ 42a-8-101 to -408 (West Supp. 1981); MINN. STAT. ANN. §§ 336.8-101 to -408 (West Supp. 1981); W. VA. CODE §§ 46-8-101 to -408 (Supp. 1981). Revisions in article 8 and in article 9 on security interests in uncertificated securities have caused considerable controversy. Compare Aronstein, Haydock & Scott, *Article 8 is Ready*, 93 HARV. L. REV. 889 (1980), with Coogan, *Security Interests in Investment Securities Under Revised Article 8 of the Uniform Commercial Code*, 92 HARV. L. REV. 1013 (1979). Revised article 9, approved in 1972 and amended in 1977 to accommodate changes in article 8 relating to uncertificated securities, see note 94 *supra*, has been adopted by over half the states. See Schimberg, *Secured Transactions*, 36 BUS. LAW 1347 (1981).

133. See 1 BUS. LAW. MEMO NO. 6, at 6 (July 1981).

134. See U.C.C., Foreword to 1978 Official Text and Comments (1978). The same Committee that drafted the 1977 article 8 revisions is also drafting the revisions to articles 3 and 4. It is known as the 348 Committee. *Id.* For a discussion of some of the problems that must be resolved in the article 3 and 4 revisions, see Greguras, *Electronic Funds Transfers and the Financial-Institution/Consumer Relationship*, 10 U.C.C. L.J. 172 (1978); Leary & Tarlow, *Reflections on Articles 3 and 4 for a Review Committee*, 48 TEMPLE L. REV. 919 (1975); Vergari, *Articles 3 and 4 of the Uniform Commercial Code in an Electronic Fund Transfer Environment*, 17 SAN DIEGO L. REV. 287 (1980).

135. See 1 BUS. LAW. MEMO NO. 5, at 3 (May 1981). See generally Mooney, *Personal Property Leasing: A Challenge*, 36 BUS. LAW. 1605 (1981). South Carolina has a controversial bailment statute that would be replaced if the new U.C.C. article is

These should be studied for integration with the version of the U.C.C. currently enacted in South Carolina.

Aspects of these and other proposals affecting South Carolina business and commercial law transcend the usual jurisdiction of any single existing legislative committee. Their consideration would be more practically effected by a joint legislative study committee created especially for that purpose.

IV. CONCLUSION

The 1981 revisions to the South Carolina Business Corporation Act represent a major step in updating the corporate statutory scheme, but further revisions are needed. The 1981 Act and proposed additional revisions to the South Carolina Business Corporation Act demonstrate a need for continuing review of all South Carolina business and commercial statutes. The most effective method for accomplishing this review is an adequately funded, permanent joint legislative study committee whose members will be able to steer needed revisions through the legislative process.

adopted. S.C. CODE ANN. § 27-23-80 (1976). See Note, *Mandatory Recording of Personal Property Leases in South Carolina: An Examination of the South Carolina Bailment Statute as Affected by U.C.C. Article Nine*, 30 S.C.L. REV. 557 (1979).