The Status of the Adoption of the Model Business Corporation Act in Montana--A Commentary

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INTRODUCTION

In adopting the Model Business Corporation Act in 1968 as the new “corporations code” the Montana legislature effected a significant change in legal governance of corporations in the state. The present Montana version is substantially similar to the Model Act which was in effect in 1968. The Model Act is the product of the Corporate Laws Subcommittee of the American Bar Association Committee on Corporations, Banking, and Business Law. The Act is subject to constant and ongoing study, and since Montana’s adoption of the Act, the Model Act has been revised substantially. Therefore, as is often the case with model or uniform codes, subsequent revisions by the national committees require similar review by the adopting jurisdiction. The purpose of this article is to identify these changes so that bench, bar, and legislature can consider them for adoption or rejection in Montana.

This article consists of two parts. Part One presents a brief overview of all the differences between the Model Act and the Montana Act. Those sections of the Montana Act which are identical to the Model Act will not be discussed. Part Two will focus on the more significant variations and discuss the pros and cons of their adoption or rejection. For ease of reference, Part One will be subdivided into groups of the more closely related sections of the Model Act as follows:

I. Substantive Provisions: Sections 2 - 52
II. Formation of Corporations: Sections 53 - 57
III. Amendment: Sections 58 - 70
IV. Merger and Consolidation: Sections 71 - 77
V. Sale of Assets: Sections 78 - 81
VI. Dissolution: Sections 82 - 105
VII. Foreign Corporations: Sections 106 - 124

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2The commentary to the work of the committee is found in ABA-ALI MODEL BUSINESS CORPORATION ACT ANNOTATED 2d (1971) [hereinafter referred to as MODEL ACT ANN.].

3The commentary to the work of the committee is found in ABA-ALI MODEL BUSINESS CORPORATION ACT ANNOTATED 2d (1971) [hereinafter referred to as MODEL ACT ANN.].

4Montana Act.

5All section numbers of the MODEL ACT refer to the current or 1969 revision of the Model Act.
The new Montana Constitution has had a significant impact on the corporations laws. The Montana Constitution of 1889 contained numerous restrictions on the activities of certain types of corporations, such as prohibiting competing railway corporations from consolidating with each other. More importantly, the old constitution required cumulative voting in all corporate director elections, while the new constitution makes no such provision. These important changes in the constitutional limitations on corporations effected by the new constitution provide further reason for this analysis.

I. SUBSTANTIVE PROVISIONS. (Sections 2-52)

Section 2 of the Model Act contains definition of terms. In some respects, the Montana counterpart is different. Subsections (a)—(h) and (j)—(n) of Section 15-2202 of the Montana Act are identical to the Model Act, while subsection (i) and subsection (o) of the former differ from the current provisions of the Model Act. Subsection (i) is a definition of “net assets.” In this subsection, Montana expressly provides that treasury shares are excluded from a definition of net assets. The Model Act provision does not exclude treasury shares. Rather, it defines net assets as “. . . the amount by which the total assets of a corporation exceed the total debts of the corporation.”

The reason that the Model Act defines net assets without any mention of treasury shares is that the commentators felt that the act should make no attempt to prescribe how assets would be valued or how the exact amount of corporate obligations would be determined. These decisions, the commentators felt, should be left to the directors, and if they are erroneously made, the directors may be personally liable for error under the provisions of Section 48 of the Model Act.

A review of other states' attitudes towards this clause shows a substantial division of opinion over its advisability. The states of Connecticut, District of Columbia, Illinois, Maine, Missouri, New Jersey, North Carolina, Tennessee, and Vermont place express restrictions on treating treasury shares as net assets of a corporation. These restrictions are practically similar to Montana's restrictions on the definition of net assets. However, the following Model Act jurisdictions do not have the phrase “excluding treasury shares” in their definition of net assets.

*Mont. Const. art. XV, § 6 (1889).
*Id. art. XV, § 4; Mont. Const. art. XIII (1972).
*Model Act § 2(1).
*2 Model Act Ann 2d at 34.
These states are Delaware, Kentucky, Louisiana, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, and Utah.

The version which Montana adopted in 1968 regarding subsection (i) was the one then found in the Model Act. In 1969 the Model Act committee eliminated the words in question and substituted the present definition of net assets. The difficulty with any definition of treasury shares emanates from the fact that such shares represent basically an incomplete transaction on the corporate balance sheet. The holding of treasury shares by the corporation should not affect stated capital, and since the treasury shares may be disposed of in a variety of ways, it should not affect a definition of net assets one way or the other until the transaction is completed. The commentary to the Model Act indicates that a surplus is restricted as long as there are shares held in the treasury and upon their disposition or cancellation the transaction is completed and the restriction is removed. It was never intended that this restriction on surplus should be duplicated by a deduction in the initial calculation of surplus. It seems that excluding treasury shares from the definition of total assets makes it clear that treasury shares will not affect either surplus or the assets of the corporation.

Section 15-2202(o) is completely different from its counterpart in the Model Act. In Montana this subsection contains a definition of the word “file.” Model Act subsection (o) is a definition of the word “employee.” The Montana Act does not define employee. However, this definition may be necessary if the legislature adopts the new Section 5 of the current Model Act dealing with indemnification of directors of a corporation. Our present indemnification provision is found in Section 15-2204(o) and does not expressly indemnify employees. The new Section 5 of the Model Act extends indemnification to officers and employees of the corporation. If Montana adopts Section 5 then the legislature should add a similar subsection defining “employee.” This additional subsection will have to be added as subsection (q), since in 1969 the Montana legislature added subsection (p) which defines “Registered Agent.” There is even further need for adding a definition of the word “employee” to the Montana Act since other recent amendments proposed by the Model Act Committee necessitate the addition of the section defining the word “employee.” For example, Section 47 of the Model Act, discussed infra, has been amended to permit loans to employees of the corporation.

Montana has adopted substantially the same provision as found in Section 4 of the Model Act. However, Montana expands Section 4 (f)
dealing with loans to officers and directors by expressly requiring approval by a majority vote of shareholders and prohibits the securing of such loans with shares of the corporation.¹⁷ The Model Act does not require shareholders' approval of loans to officers or employees of the corporation.¹⁸ With regard to Section 15-2204(g), Montana permits domestic corporations to deal in securities, obligations or other interests not only of corporations but also in the assets of associations, partnerships, joint ventures, cooperatives, or other individuals.¹⁹ With respect to Section 15-2204(d), Montana is unique among the 50 states in that it permits corporations to acquire property by eminent domain proceedings.²⁰ Since Montana adopted the Model Act in 1968 there have been minor changes made in Section 4(m) and Section 4(n). Montana Section 15-2204(m) permits corporations to make donations for certain enumerated charitable purposes and in time of war to make donations in aid of war activities.²¹ The Model Act deletes the phrase "and in time of war to make donations in aid of war activities."²² The draftsmen of the Model Act state that because of the problems inherent in a feasible definition of the phrase "in time of war," the provision was eliminated.²³ Section 4(n) differs from the Montana counterpart in that it no longer limits such corporate activity to aiding a war effort but permits the corporation to transact any lawful business in aid of governmental policy.²⁴

The commentators state that changing conditions render the Montana type of grant defective in two respects. The first defect is that the waging of undeclared wars and the engaging in varying forms of hostilities, leaves uncertain the legal basis for the exercise of the power. The second reason is the emergence of the equally important government programs for the elimination of poverty, disease, and civil strife. Therefore, the expanded provision was to enable the corporation, should it desire to do so, to support all governmental policies, not simply war policies.²⁵

With regard to subsection (p) of Section 4 of the Model Act, Montana has not adopted the current Model Act provision.²⁶ This provision permits a corporation, in effect, to become a partner or associate in some external, noncorporate enterprise. Montana makes no such distinction nor does it expressly grant such authority to corporations.²⁷ The

¹²1 MODEL ACT ANN. 2d at 115-116.
¹³R.C.M. 1947, § 15-2204(g).
¹⁴R.C.M. 1947, § 15-2204(d). Part two of this article will deal with this feature of the Montana Act in more detail.
¹⁵R.C.M. 1947, § 15-2204(m).
¹⁶MODEL ACT § 4.
¹⁷MODEL ACT ANN. 2d at 170-171.
¹⁸MODEL ACT § 4(n).
¹⁹1 MODEL ACT ANN. 2d at 183.
²⁰MODEL ACT § 4(p).
draftsmen, in their comment to this section, indicate that for quite some time, common law courts denied any implied power in the corporation to become a partner, requiring such authority to be expressly granted in the statute or articles of incorporation. The reasons for placing such a restriction on a corporation becoming a partner were: first, the existence of the possibility that the partnership agreement would deprive the corporate directors of their statutory management of corporate assets; and secondly, that without such a restriction, shareholders might be subjected to unanticipated risks. In eliminating the restriction in the current Act, the draftsmen point to the more modern view expressed in the courts of an increased willingness to approve such arrangements, particularly where business objectives were limited. The trend has developed in instances of the so-called joint venture rather than in a general partnership. Many jurisdictions, however, recognize the statutory power of a corporation to participate in a partnership enterprise and not simply a joint venture enterprise. Also, the draftsmen have pointed out that such power frequently appears in the articles of incorporation regardless of statute. This trend is analogous to an earlier trend. At common law, corporations were not permitted to acquire shares in other corporations unless the statute governing their operations permitted them to do so, but when business practice indicated a need for change the power was granted by statute. Therefore, it seems appropriate to extend this power to permit acquisition of interests in noncorporate enterprises. It should be pointed out, however, that approximately 28 jurisdictions do not expressly grant this power by statute.

Montana has essentially the 1950 Model Act provision dealing with the power of a corporation to indemnify its officers and directors. The section does not of itself grant indemnity but authorizes indemnity to be granted as the corporate directors desire. It is limited only to claims, liabilities, expenses, and costs necessarily incurred by an officer or director in connection with the defense, compromise, or settlement of any action occasioned by acts he committed in such capacity. However, the section does allow a wider form of indemnity if the articles, bylaws, or shareholder resolution permit.

In 1969 the indemnity provision contained in Section 4(o) of the Model Act was removed, changed, and placed in a separate, renumbered Section 5. The provision is still permissive except that it grants a cause of action to any employee who has successfully defended a suit regard-
ing his mismanagement of corporate affairs, entitling him to recover his reasonable expenses in connection with such defense.\(^6\)

Another significant change is that under subsection (g) of Section 5, a corporation is given the power to maintain indemnity insurance on behalf of directors, officers, employees, and agents or others acting for the corporation. The new section divides the power of indemnification into two basic litigation situations. Subsection (a) deals with so-called third-party suits, and subsection (b) deals with derivative actions. In both, the power to indemnify extends to a person who is a party or is threatened to be made a party to litigation by reason of the fact that he has been employed in one of the enumerated capacities on behalf of the corporation. Under subsection (a), statutory authority exists to permit reimbursement of expenses, judgments, fines, and amounts paid in settlement of all third-party actions. There is a limitation as to amounts actually and reasonably incurred in connection with the litigation. With respect to derivative actions under subsection (b), however, indemnification is permitted only for expenses. There is no indemnification permitted for settlement of derivative actions. As to both subsections (a) and (b), a new standard of conduct is applicable; it permits indemnification regardless of whether the action is a third-party suit or derivative action “if the person involved acted in good faith and in a manner he believed to be in or not opposed to the best interests of the corporation.” This represents a substantial change in that the Act now covers any act that is done merely by reason of being an officer or director as opposed to acts committed in the capacity of an officer, director, or otherwise directly related to the office.

With respect to third-party criminal action, the standard provided for indemnification is that the person: “have no reasonable cause to believe his conduct was unlawful.” In a derivative action, the section provides in subsection (b) “. . . that no indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation.” Expenses may be nonetheless reimbursed even though there has been an adjudication of liability in derivative actions when the court determines that in view of all the circumstances, such person is fairly and reasonably entitled to indemnification for such expenses as the court deems proper.\(^6\)

At the time Montana adopted the Model Act, Section 6 required a two-thirds vote of shares in order to authorize the corporation to acquire or dispose of its own shares with capital surplus, absent an articles of incorporation provision permitting such action.\(^7\) In 1969, the drafts-
men approved a change of the vote requirement from two-thirds to merely a majority.\textsuperscript{38} This vote change was adopted without any comment other than to note the change in the vote requirement. Presumably, the change was made in order to allow a corporation whose articles of incorporation did not expressly give the corporation this power \textit{ab initio} to effect such action more readily. It was also adopted for the purpose of preventing a minority of the shareholders from blocking the desires of the majority in approving reacquisition of shares.

Section 8 of the Model Act, which is found in Section 15-2207 of the Montana Act, deals with legal requirements of the corporate name.\textsuperscript{39} While the Model Act requires that the corporate name shall contain the word “corporation,” “company,” “incorporated,” or “limited,” or an acceptable abbreviation of one of such words,\textsuperscript{40} Montana merely requires that the corporate name not contain anything contrary to the corporate purpose, and that the name must differ from any name currently reserved with the secretary of state.\textsuperscript{41} The Model Act, however, substantially alters this latter provision and permits use of such a name if the applicant files with the secretary of state either the written consent of the holder of the reserved or registered name permitting the applicant to use a similar name, or a certified copy of a final judicial decree establishing the prior right of the applicant to use of the name in this state.\textsuperscript{42} The draftsmen indicated the reason for this change was the problem created when a group of related companies desires to make use of a common identification. The other exception is merely a clarification of the recognition to be given any adjudication of prior right.\textsuperscript{43} The final paragraph of subsection (c) deals with a procedural problem that is sometimes created by a merger when the successor or surviving corporation desires to continue to use the name of its predecessor. The Model Act permits the successor corporation to use the name of its predecessor corporation if the predecessor was organized under the laws of this state.\textsuperscript{44}

The Montana version of Model Act Section 12 is found in Section 15-2212 and is basically similar to the Model Act section.\textsuperscript{45} The purpose of this section is to permit a change of the registered office or the registered agent by action of the board of directors and to obviate the necessity of shareholder approval. The provision seeks to avoid the necessity of calling a shareholder meeting to approve an amendment of the articles of incorporation to effect such a change. Section 15-2248

\textsuperscript{38}Model Act § 5.
\textsuperscript{39}R.C.M. 1947, § 15-2207.
\textsuperscript{40}Model Act § 8.
\textsuperscript{41}R.C.M. 1947, § 15-2207.
\textsuperscript{42}Model Act § 8.
\textsuperscript{43}1 Model Act Ann. 2d at 294.
\textsuperscript{44}Model Act § 18.
\textsuperscript{45}R.C.M. 1947, § 15-2212.
requires that the name and address of both the registered office and that of the registered agent of the corporation appear in its articles. Therefore, any change would necessitate an amendment procedure unless statutory exception were permitted as is provided in Section 13. Another difference between Montana and the Model Act is that Montana requires a verification merely by any officer of the corporation on the statement of change that is to filed with the secretary of state. The Model Act specifically requires verification by a president or vice president of the corporation.

Section 14 of the Model Act, which deals with service of process on the corporation, finds its counterpart in Section 15-2213. Montana specifically provides that service of process shall be pursuant to the Montana Rules of Civil Procedure. This requirement is consistent with other sections of the Montana Act concerning service requirements. Furthermore, the commentary to the Model Act suggests that Section 14 is not an exclusive provision, but exists as an addition to other provisions of the specific laws of the state adopting the Act.

Section 15 of the Model Act deals with the power of the corporation to create and issue the number of shares stated in the articles of incorporation. The comparable Montana provision is Section 15-2214, which is basically similar to the Model Act with the exception that Montana adds a subdivision (f) authorizing the issuance of bonds and debentures convertible into shares. This subsection seems necessary in light of the fact that nowhere else in the Model Act is there any statement of the power of a corporation to issue debt securities. The power to issue debt securities is implied only and is not expressly stated in the general powers section of the Act. Therefore, it would seem that subdivision (f) is actually needed in the Model Act in order to make the power mentioned above more explicit.

Section 16 of the Model Act deals with the issuance of shares of preferred or special classes in series. The comparable provision in Montana is found in Section 15-2215. Montana does not have subsection (f) dealing with variation between different series within the class as to voting rights. Without this section it might be inferred that it is the intent of the Montana legislature not to permit voting rights to vary within a class. The Montana Act, however, specifically confers upon the Board of Directors the powers to classify shares

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50 MODEL ACT ANN. 2d at 345.
51 MODEL ACT § 15.
52 R.C.M. 1947, § 15-2214.
54 R.C.M. 1947, § 15-2204.
55 MODEL ACT § 16.
with relative rights and preferences according to the existing article provisions, or by action of the Board of Directors. It seems that some vagueness may arise from an implication that the legislature did not intend that voting rights be denied to some, but not all, of a series within a class. Voting rights could be denied by an interpretation of the existing Montana provision establishing this power either in the articles of incorporation or by action of the board. It would seem plausible to add subsection (f) to eliminate this vagueness.

A variance exists between the Montana Act and Section 18 of the Model Act which deals with consideration for shares. The counterpart of Section 18 is Section 15-2217. Montana's version is similar to the pre-1969 Model Act. In 1969, Section 18 was amended to enlarge the definition of consideration received for shares issued in a conversion to include shares that are issued upon conversion of indebtedness as well as other shares. This change is a practical change and should be considered for adoption in Montana. It merely keeps abreast of some of the more modern financing techniques in the area of exchange of shares for debt security.

Both Sections 19 and 20 of the Model Act are included in Section 15-2218 of the Montana Act. There is a significant difference between Montana and the Model Act with regard to the acceptance of promissory notes as consideration for the issuance of shares. The Model Act provides that neither promissory notes nor future services shall constitute lawful consideration for shares of the corporation. This language appears in the 1969 version of the Model Act and varies from the Montana pre-1969 version in that the clause "for the issuance of" does not appear in the Montana Act or the pre-1969 Model Act. The commentary to the Model Act expressly states that this amendment was made in order to make it clear that the prohibition mentioned therein was directed solely to payment of consideration upon original issuance, and not to subsequent sales of shares of the corporation.

This comment, in the opinion of the writer, adds further vagueness to the issue rather than clarifying it. It seems obvious that the original issuee of the shares could resell them to third parties for whatever consideration he agrees to as long as the shares were originally issued as fully paid and nonassessable. If the language is interpreted to mean that after original issuance the corporation could sell any of its shares to third parties in exchange for promissory notes or future services, some difficulties may exist. Any suggestion that the corporation can, after having reacquired its own shares, reissue them for promissory notes

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65Model Act § 18.
68Model Act § 19.
69Model Act Ann. 2d at 436.
or future services would seem to violate the original purpose of this section which is to avoid at any time the issuance of bonus, discount, or watered shares of the corporation.

It appears that the vagueness created by the commentary would militate against adopting this specific amendment until some clarifying language can be drafted to more clearly express the intent of the draftsman. The commentary to the Model Act indicates that Montana accepts promissory notes as consideration for issued shares. This statement is incorrect. Montana clearly prohibits a corporation from issuing its shares for promissory notes or future services.

With regard to Section 20 of the Model Act, Montana has the pre-1969 Model Act provisions which differs from the current provision by providing that any issuance of rights or options to acquire shares of the corporation stock which are extended to directors, officers, or employees must be approved by a majority of the shareholders or by a plan so approved. Section 20 of the Model Act was amended in 1969 to eliminate the requirement that stock option plans for employees be approved by shareholders in advance and permitted subsequent ratification as acceptable approval.

The next significant difference between the Model Act and Montana is found in Section 24 of the Model Act dealing with the issuance of fractional shares. The Montana version is found in Section 15-2222, which is identical to the pre-1969 Model Act. It does not specifically allow a corporation to arrange for the disposition of fractional interests or to pay in cash the fair value of fractional interests of a share. The commentary to the Model Act indicates that the reason for this amendment in 1969 was to allow convenience by authorizing the sale of all fractional share interests at the outset instead of undergoing the expense and delay of a script issue. Simple and cheap alternatives to the issuance of script has grown in favor recently and has been adopted by several non-Model Act states, including Delaware.

Section 27 of the Model Act, which has its counterpart in Section 15-2225 of the Montana Act, was amended in 1969 to indicate that although the power to adopt, amend, or repeal bylaws may be expressly vested in the board of directors, such power is subject to an inherent right in the shareholders to revoke such express vesting and assume

\*Id. at 438.
\*MODEL ACT § 20.
\*MODEL ACT § 24.
\*R.C.M. 1947, § 15-2222.
\*1 MODEL ACT ANN. 2d at 501.
\*Id.
\*R.C.M. 1947, § 15-2225.
authority over the bylaws at any time. One of the unique features of the Model Act is that unless the articles expressly reserve power over the bylaws in the shareholders, then this power vests in the board of directors. Section 15-2225 does not contain the above-mentioned language. The change in the Model Act is declaratory of the common law. In the absence of such language, a contrary implication may be created that the shareholders absolutely delegated this to the board beyond any power to recall such delegation.

Section 28 of the Model Act deals with the holding of annual and special shareholder meetings. Its Montana counterpart is Section 15-2226. The Montana Act is unique and does not follow even the pre-1969 version of the Model Act. Section 15-2226 specifically provides that a special meeting of shareholders may be called by either the president, board of directors, or such other persons as may be designated in the articles or incorporation or the bylaws. Montana further provides that before the shareholders can call a special meeting of the shareholders, not less than one-half of all shares entitled to vote must approve the call of such meeting. This varies substantially from the Model Act and most other jurisdictions in that the call requirements are among the highest in the nation.

It seems fair to comment that the effect of this provision is to preclude minority groups of shareholders from calling special meetings of shareholders. The Model Act requires that only one-tenth of all shares entitled to vote is necessary to call a special meeting of shareholders. Montana makes further provision that the failure to hold the annual meeting at designated times and places does not work a dissolution of the corporation.

Section 32 of the Model Act, dealing with quorum of shareholders has its counterpart in Section 15-2230 of the Montana Act. Montana did not adopt the Model Act provision. It provides instead that a majority of the shares entitled to vote shall constitute a quorum unless otherwise stated in the articles or bylaws of the corporation; if the quorum is otherwise stated, no quorum requirement can be less than one-third of the shareholders of a Montana corporation. This latter sentence compares with the current Model Act provision. The second sentence of Section 32 of the Model Act deals with general vote requirements by shareholders assuming that the proper quorum is present. Montana is identical to the Model Act in that both Acts require a ma-

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*MODEL ACT § 27.
*MODEL ACT § 28.
*MODEL ACT § 28.
*MODEL ACT § 32; R.C.M. 1947, § 15-2230.
Majority vote to approve general action unless the articles or the bylaws provide for greater than majority vote requirements. It should be noted that Section 32 is a general voting requirement and it applies only where the articles, bylaws, or a specific statute does not control the amount of votes required for the corporate action involved.

Section 33 of the Model Act and Section 15-2231 of the Montana Act deal with the voting of shares. Montana varies from the Model Act provision with regard to paragraphs 1, 2, and 4 of Section 33 of the Model Act, otherwise it is identical. This discussion will dwell only on these three differing paragraphs. As to paragraph 1, Montana requires one vote per share unless otherwise provided in the articles of incorporation. The Model Act provision adopts a new concept creeping into shareholder voting concepts which allows either more than one vote or less than one vote per share. Under paragraph 2, Montana does not permit the voting or counting of shares of a corporation of its own shares of stock where the corporation is holding them in a fiduciary capacity. With regard to paragraph 4, Montana varies from the Model Act in that it contains a provision which is declaratory of the requirements of the old Montana constitutional provision regarding cumulative voting. Under the old Montana constitution, article XV, section 10, every shareholder in a Montana corporation was given a constitutional right to cumulative voting of his shares in any director election.

With the adoption of the new constitution, this specific mandate was deleted. However, paragraph 4 continues to carry the requirement of cumulative voting. It would seem appropriate for the legislature to give consideration to deleting the requirement of cumulative voting. Since cumulative voting can be easily removed as a requirement in director elections in Montana corporations by the simple technique of securing unanimous shareholder consent in a shareholder voting agreement other or external document, the statute should be amended to make cumulative voting an optional articles provision.

In 1969 some significant amendments to Section 34 of the Act were adopted. One such amendment which has special significance, requires the trustee under a voting trust to maintain a record of the holders of voting trust certificates comparable to those records required to be kept for the corporation's shareholders and to make such records subject to inspection rights similar to the inspection rights of shareholders.

Another amendment of particular significance to close corporations is the adoption of a new paragraph recognizing that voting trusts are not the exclusive means by which shareholders may pool voting rights in a corporation. This last paragraph provides:


MODEL ACT § 34.
Agreements among shareholders regarding the voting of their shares shall be valid and enforceable in accordance with their terms. Such agreements shall not be subject to the provisions of this section regarding voting trusts.

This section now gives recognition to the shareholder voting agreement as a separate and distinct contract not governed by the terms of the Model Act. The significance of this provision is paramount when pooling agreements are considered from the perspective of planning for a closely held corporation. Montana’s version of Section 34 appears at 15-2232 of the Montana Code.

Section 35 of the Model Act and Section 15-2233 of the Montana Act govern matters related to the board of directors. Montana’s version varies from the Model Act in two important respects. First, Montana’s provision expressly provides that directors of the corporation need not be residents of the state unless the articles or bylaws so require. No such provision exists in the Model Act. However, the Model Act would permit the requirement of such a qualification. The most significant difference between the Montana Act and the Model Act is that Montana has not adopted the 1969 amendment to this section of the Model Act which permits an exception to the usual statutory requirement that the business and affairs of a corporation shall be managed by the board.

The Model Act, however, permits the stockholders to reserve this power to themselves by a provision in the articles. This section has been noted by several commentators as an important one to the management of closely held corporations. Since Montana requires every corporation to have at least a three-member board of directors, Section 35 of the Model Act provides a very useful means whereby the control and management of a corporation can be reserved to the shareholders, especially where the corporation is owned by only one shareholder. In such a situation, a sole shareholder corporation can retain management responsibility and control from a board which consists of one or more so-called “dummy” directors. This section of the Model Act is perhaps the pivotal point in any discussion of other sections of the Act which have recognized utility to the formation and operation of closely held corporations. It seems to the writer that Montana would have keen interest in these sections which favor utility to the closely held corporation since very few publicly-owned corporations incorporate in this state.

Section 36 of the Model Act, which has its counterpart in Section 15-2234 of the Montana Business Corporation Act, is closely related to

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80 See F. O’Neal, Close Corporations, § 4.01 (1971).
81 R.C.M. 1947, § 15-2232.
82 Model Act § 35.
83 R.C.M. 1947, § 15-2233.
84 R.C.M. 1947, § 15-2233.
85 Model Act Ann. 2d at 755.
Section 35 since it specifically deals with the number and election of directors. Montana's provision is similar to the pre-1969 Model Act section which specifically required a corporation to have not less than three directors and also omitted the following phrase which now appears in the current version of the Model Act: "or in the manner provided in the articles of incorporation." The 1969 amendments to the Model Act represent current changes in common law or traditional jurisprudential attitudes about the so-called one-man corporation. The Model Act now reduces the number of directors required for a Model Act corporation to at least one. It would seem that Montana has all but impliedly suggested the need for amendment when one compares the Montana section with the Montana Professional Services Corporation Act which requires only one director. The 1969 amendments to the Model Act also provide some flexibility by permitting the number of directors to be altered without the need to amend the bylaws as long as a method of alteration of the composition of the board is set forth in the articles or bylaws of the corporation.

Sections 38 and 39 of the Model Act are found in Sections 15-2236 of the Montana Code with the following significant differences: Section 38 of the Model Act deals with vacancies in the board of directors while Section 39 deals with removal of directors. Both of these sections have been combined into one section in the Montana Act. With regard to Section 38, Montana is identical to the Model Act but specifically adds the requirement that a directorship must be filled by the shareholders if the previous occupant was removed by action of the shareholders.

In its version of Section 39, Montana provides that the entire board of directors may be removed with or without cause by a vote of $\frac{2}{3}$ of the shareholders entitled to vote, or if the corporation has less than 100 shareholders then only a majority vote is necessary to remove the entire board of directors. This is substantially different than the Model Act since it provides that any director, or the entire board, may be removed with or without cause. Montana provides that if less than the entire board is to be removed, then no one director can be removed if there are sufficient votes against his removal that would have been adequate to elect him to the board by cumulative voting. Presumably this latter section would be removed from Montana's version of the Model Act if the legislature were to change the provisions regarding cumulative voting as mentioned above.

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8 MODEL ACT § 36; R.C.M. 1947, § 15-2234.
87 R.C.M. 1947, § 15-2101 et. seq.
88 MODEL ACT § 36.
89 MODEL ACT §§ 38, 39; R.C.M. 1947, § 15-2236.
90 R.C.M. 1947, § 15-2236. This section was amended in 1969 to require two-thirds vote in those corporations with more than 100 shareholders or only a majority vote in corporations with fewer than 100 shareholders.
Section 40 of the Model Act, which appears in the Montana Act as Section 15-2237, deals with quorum requirements for board meetings. Montana adopted the pre-1969 Model Act section which expressly precluded the bylaws from providing a manner for fixing the number of directors for quorum purposes. The Model Act now permits the bylaws or the articles to fix quorum requirements for the board. The added advantage of Section 40 of the Model Act permits changes in quorums as long as the appropriate procedure is set out in the bylaws. In studying this section, it is important to call the reader's attention to an earlier Montana case which may still be significant despite the passage of the Model Act in Montana. In the 1933 case of Alward v. Broadway Gold Mining Company, the Montana Supreme Court prohibited interested directors from being counted for quorum purposes in the meeting of the board called for the purpose of approving a director-interested transaction with the corporation. This case may still be precedent despite the passage of the Model Act and Montana's failure to adopt Section 41 of the Model Act dealing with director-interested contracts.

Section 41 of the Model Act represents an attempt by the draftsmen to ameliorate some general rules of common law regarding the voidability of director-interested transactions. As noted above, Section 41 has not been adopted by the Montana legislature. Presumably the reason for the nonadoption of Model Act Section 41 is because it expressly permits interested directors to be counted for quorum purposes at a board meeting called for the purpose of approving such director-interested contracts. Director-interested contracts have been the subject of much litigation in the history of corporations law. It seems probable that Montana's refusal to adopt Section 41 is due primarily to the disapproval of counting interested directors for quorum purposes found in Alward v. Broadway Gold Mining Company.

Section 43 of the Model Act and Montana Act Section 15-2239 deal with place and notice of director's meetings. The two sections are similar except that Montana does not have the newer Model Act provisions permitting meetings of the board of directors or board committees by means of a conference telephone or similar equipment.

Section 44 of the Model Act deals with action by directors without a meeting. Montana combines this section with additional language regarding action by shareholders without a meeting into a common
provision which is found at Section 15-22-134 of the Montana Act. Montana permits both shareholder and director action to be taken without a meeting as long as all of the membership of each group unanimously consent in writing. Other than this specific comment Montana does not differ from the Model Act.

Section 45 of the Model Act governs the payability of dividends. Montana follows only those Model Act provisions which are basic, but adds some alternative provisions. The Montana version appears at Section 15-2240. Montana not only permits the directors to declare and pay dividends in cash, property, or its own shares when there is an unrestricted and unreserved earned surplus of the corporation; but it also permits the board to declare and pay dividends from the unreserved and unrestricted net earnings of the current fiscal year and the next proceeding fiscal year taken as a single period to the extent that the articles of incorporation don’t prohibit such action. Montana, in adopting the latter section of the alternative provision of the Model Act, indicates that statutory authority exists to permit a corporation which does not usually have an unreserved and unrestricted earned surplus to nevertheless pay a dividend in these limited circumstances.

The Montana alternative is known as the “nimble” dividend. Montana placed an additional statutory restriction on a legally available surplus which does not specifically appear in the Model Act. It prohibits the declaration of any dividend if the stated capital of the corporation has been diminished by depreciation, losses, or other deductions from stated capital to such an extent that the fund legally available to pay dividends would be less than the amount of the stated capital of any shares which would have distribution preference. The rationale behind this restriction is to protect those shares of the corporation which have a distribution preference from any impairment or reduction of amounts owed under such preferences by the payment of dividends. An important change, however, between the Montana Act and the 1969 Model Act deals with deletion of the phrase, “on its outstanding shares.” Before 1969 dividends were presumably payable only on outstanding or non-treasury shares of the corporation. The commentary states that the elimination of this language was intended to permit treasury shares to be recognized in dividend distributions.

Section 46 of the Model Act deals with distributions from capital surplus, and has its counterpart in Section 15-2241 of the Montana Act.
Montana has the pre-1969 Model Act provision which forbids such distributions if they would reduce net assets below voluntary liquidating preferences. The 1969 amendments to the Model Act changed the test from the amount payable in the event of "voluntary" liquidation to the amount payable in the event of "involuntary" liquidation.

The commentary to the Model Act states that this is a practical consideration to creditors and others dealing with the corporation and applies as an external control on the amount available for liquidation preferences.\(^{105}\) According to the commentary, this section was also amended in order to correspond with the same test in Section 66 of the Model Act dealing with the redemption or repurchase of redeemable shares.\(^{106}\) According to Section 66 of the Model Act, no redemption or repurchase of redeemable shares could be made either when such action would reduce or result in a reduction of net assets below liquidation preferences. Therefore, it seems that the amendment to Section 46 was needed in order to bring reduction of net assets in the event of all distributions from capital surplus in line with the proscriptions against reduction of net assets in the event of repurchase or redemption of redeemable shares by the corporation. However, the Act continues to permit stricter limitations on reductions of net assets or reduction of capital surplus by special article provisions.

Section 47 of the Model Act deals with loans to employees and directors.\(^{107}\) This section was added by the Model Act Committee in 1969, and as such was not a part of the Model Act at the time Montana adopted the Act. However, Montana does have provisions dealing with the subject matter in Sections 15-2204 and 15-2242(d).\(^{108}\) The new Model Act provision permits the board of directors to authorize loans to employees, including officers, without the necessity of shareholder approval.\(^{111}\) The applicable Montana provisions require shareholder approval not only of loans to directors but to officers as well.\(^{112}\) Both Montana and the Model Act do not require shareholders approval of loans to employees.

Section 48 of the Model Act deals with the liability of directors in certain cases.\(^{113}\) Montana has adopted a virtually identical provision in Section 15-2242.\(^{114}\) The principle difference between Section 15-2242 and the Model Act is that Montana has adopted an additional provision.

\(^{105}\) Model Act Ann. 2d at 937.

\(^{106}\) Id.

\(^{107}\) Model Act § 47.

\(^{108}\) R.C.M. 1947, §§ 15-2204(f) and 15-2242(d).

\(^{111}\) R.C.M. 1947, §§ 15-2204(f) and 15-2242(d).

\(^{113}\) Model Act § 47.

\(^{112}\) Id.

\(^{113}\) R.C.M. 1947, § 15-2242(f).

\(^{114}\) Model Act § 48.

\(^{114}\) R.C.M. 1947, § 15-2242.
(d) which imposes liability on directors who assent to unauthorized loans to officers or directors.\textsuperscript{115} This provision is necessitated by the requirements of Section 15-2204(f) prohibiting loans to officers and directors unless approved by the shareholders. Since the 1969 amendments to the Model Act specifically deleted shareholder approval of loans to any employees including officers, then a parallel amendment to Section 48 of the Model Act was required. Because Montana does not permit loans to officers and directors without shareholder approval, the foregoing amendment to Section 48 may not be necessary depending upon the action of the legislature with respect to Section 47 dealing with shareholder approval of loans to employees, including officers.

Section 49 of the Model Act is entitled “Provisions Relating to Actions by Shareholders.”\textsuperscript{116} Its counterpart is found in Section 15-2243 of the Montana Act.\textsuperscript{117} Montana is similar to the Model Act except for the provision of the Model Act dealing with security for costs in such actions. In this state, Montana Rule of Civil Procedure 23.1 governs the procedure in shareholder suits.\textsuperscript{118} Montana follows the contemporaneous ownership rule which requires the plaintiff to have been a shareholder at the time the alleged wrong occurred or that his shares devolved upon him by operation of law from someone who was.\textsuperscript{119} Rule 23.1 has the usual requirements of demand on the board of directors and the other shareholders as conditions precedent to suit.\textsuperscript{120}

Section 52 of the Model Act deals with books and records and, in particular, defines the limitations under which shareholders can obtain inspection of books and records of the corporation.\textsuperscript{121} Montana has the pre-1969 Model Act version of Section 52 which is at Section 15-2246 of the Montana Act.\textsuperscript{122} The Model Act has been amended to cover all books, records, and minutes that are not only in written form, but which are in a form convertible into written form within a reasonable time.\textsuperscript{123}

\textbf{II. PROVISIONS DEALING WITH FORMATION OF CORPORATIONS. (Sections 53-57)}

Section 53 of the Model Act deals with qualifications of incorporators of a Model Act corporation.\textsuperscript{124} Montana's provision regarding incorporators appears at Section 15-2247 and varies from the Model

\textsuperscript{115}\textsuperscript{R.C.M. 1947, \S 15-2242(d).}
\textsuperscript{116}\textsuperscript{MODEL ACT \S 49.}
\textsuperscript{117}\textsuperscript{R.C.M. 1947, \S 15-2243.}
\textsuperscript{118}\textsuperscript{MONTANA RULES OF CIVIL PROCEDURE [hereinafter cited as M. R. CIV. P.] Rule 23.1.}
\textsuperscript{119}\textsuperscript{R.C.M. 1947, \S 15-2243.}
\textsuperscript{120}\textsuperscript{M. R. CIV. P., Rule 23.1.}
\textsuperscript{121}\textsuperscript{MODEL ACT \S 52.}
\textsuperscript{122}\textsuperscript{R.C.M. 1947, \S 15-2246.}
\textsuperscript{123}\textsuperscript{MODEL ACT \S 52.}
\textsuperscript{124}\textsuperscript{MODEL ACT \S 53.}
Act as to age requirements. The Model Act does not specifically discuss the question of age. It merely states that the function of incorporators under the Model Act is ritualistic and of little or no substance. Under the Model Act the incorporator merely signs the articles of incorporation, secures their filing with the appropriate state authority, and then upon receipt of the charter, delivers a notice or call of first meeting of directors for the purpose of organizing the corporation. The only other function that an incorporator has under the Model Act is to dissolve the corporation if it commenced no business within two years after it received its charter. Perhaps the Model Act commentary assumes that none of these functions would involve any problems of contractual liability by a minor. Such an assumption is not widely supported. Montana specifically requires incorporators to be of legal age. Most other states make a similar requirement. Montana follows the Model Act in providing that a corporation may have only one incorporator.

Section 54 of the Model Act governs those provisions which must appear in the articles of incorporation. The Montana counterpart is Section 15-2248. Montana follows the Model Act provision in substance and varies only with regard to provisions in the article dealing with the limitation or denial of preemptive rights. Prior to 1969 the Model Act required that limitations or denials of preemptive rights had to be stated in the articles amendment of the Model Act in 1969. This requirement was substantially changed. Under the current version, preemptive rights are not implied and must be granted affirmatively by the articles. The lack of such a provision in the articles indicates their nonexistence. Prior to 1969 silence in the articles indicated the expressed assumption of preemptive rights. Montana's version of the Model Act has always required an express reservation of the preemptive right in the articles.

Section 57 of the Model Act deals with the organizational meeting of the directors and is found at Section 15-2251 of the Montana Act. Montana varies from the Model Act by requiring the organizational meeting be at the call of the incorporators rather than the directors. The 1969 changes to the Model Act require that the directors named in the articles of incorporation effect the call of the organizational meet-

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125 R.C.M. 1947, § 15-2247.
126 See Model Act Ann. 2d at 161.
128 Model Act § 54.
131 R.C.M. 1947, § 15-2248 (g).
132 Model Act § 57.
ing of the board.\textsuperscript{135} It would seem that this change in the Model Act is ill-advised unless it makes the further requirement that the secretary of state is required to notify some person other than the incorporator or his representative that the articles have been accepted for filing and that a charter has been issued. Since the incorporators are the recipients of such notice, they would be the appropriate persons to call the organizational meeting of directors.\textsuperscript{136}

III. PROVISIONS DEALING WITH AMENDMENTS
(Sections 58-70)

Section 58 of the Model Act,\textsuperscript{137} which appears at Section 15-2252 of the Montana Act,\textsuperscript{138} deals with the right to amend articles of incorporation. The Montana version is identical to the Model Act provision, with the exception that appropriate changes were made in the Model Act amendments to reflect that, as now provided in Model Act Section 54, the articles do not limit or deny preemptive rights, but they must be affirmatively expressed.

Section 59 of the Model Act has been adopted in comparable fashion in Montana and appears at Section 15-2253.\textsuperscript{139} The significant differences between Montana and the Model Act are that if any amendment to the articles of incorporation will increase the authorized number of shares of the corporation, Montana requires thirty days' notice to shareholders.\textsuperscript{140} Montana also permits amendments to the articles by a majority of all shares entitled to vote thereon. The pre-1969 version of the Model Act required a two-thirds vote of all shares entitled to vote before the articles of incorporation could be amended. Also, Montana has not adopted the 1969 change in the Model Act which abolishes the necessity of shareholder approval of any amendment to the articles of incorporation if none of the shares of the corporation have been issued or are presently issued and outstanding in the corporation.\textsuperscript{141} In this circumstance only directors' approval would be required under the Model Act.

Section 61 of the Model Act deals with articles of amendment.\textsuperscript{142}

\textsuperscript{135}MODEL ACT § 57.
\textsuperscript{136}See R.C.M. 1947, § 15-2249 which requires the secretary of state to return the approved articles and certificates of incorporation to the incorporators or their representative. Also, R.C.M. 1947, § 15-2251 indicates that the organizational meeting cannot be held until after the issuance of the certificate of incorporation. The MODEL ACT change in Section 57 implies the need for a corresponding change in R.C.M. 1947, § 15-2249 requiring the certificate to be sent to the directors named in the articles.
\textsuperscript{137}MODEL ACT § 58.
\textsuperscript{138}R.C.M. 1947, § 15-2252.
\textsuperscript{139}MODEL ACT § 59; R.C.M. § 15-2253.
\textsuperscript{140}R.C.M. 1947, § 15-2253.
\textsuperscript{141}MODEL ACT § 59.
\textsuperscript{142}MODEL ACT § 61.
The Montana counterpart is in Section 15-2255 and is similar to the Model Act except that the Model Act does not expressly dispense with shareholder approval of articles of amendment where no shares of the corporation have been issued, or none are presently issued and outstanding.

Section 64 of the Model Act deals with restated articles of incorporation. The Montana provision which is Section 15-2258 varies considerably from the Model Act. Montana requires that restated articles of incorporation be submitted for shareholder approval. The new Model Act provision eliminates this requirement and authorizes director action alone unless the restatement necessitates a change in the articles of incorporation.

IV. PROVISIONS DEALING WITH MERGER AND CONSOLIDATION (Sections 71-77)

Sections 71 and 72 of the Model Act deal with procedures for both merger and consolidation of corporations. Their counterparts appear in Sections 15-2265 and 15-2266 of the Montana Act. Montana is similar to the Model Act except that in 1969, Section 71 of the Model Act was amended by adding a clause to paragraph (c) which permitted the conversion of shares of each merging corporation in whole or in part into cash, property, shares, obligations, or other securities of the surviving or any other corporation. It appears that this amendment was added in order to conform Section 71 with Section 72. This language was present in Section 72(c) of the Model Act. Since this option should be present in both merger and consolidation, a reforming amendment to the Montana Act appears advisable.

Section 73 of the Model Act deals with the procedure for approval by shareholders of plans for mergers or consolidations. The applicable section in Montana is found in Section 15-2267, and varies substantially from the newer Model Act provision. The Model Act requires approval by only a majority of shareholders of such plan and represents a substantial change from the Montana Act which requires a two-thirds majority. The commentary to the Model Act states as a reason for this change the need to recognize the "generally prevailing view" that unless otherwise provided in the articles, a minority should not be per-

2-Model ACT § 61.
3-Model ACT § 64.
4-R.C.M. 1947, § 15-2258.
6-Model ACT §§ 71, 72.
8-Model ACT § 71(c).
9-Model ACT § 73.
mitted to deter the wishes of the majority. This is consistent with other changes in shareholder vote requirements elsewhere in the 1969 Model Act. This amendment may invite criticism since it now permits a majority to effect what is a substantial change in corporate objectives regardless of the minority’s wishes. The controversy develops from criticism from other commentators that this change was influenced by those members of the ABA Corporations Law Subcommittee who were also instrumental in drafting the new Delaware General Corporation Law.

Section 75 of the Model Act appears at Section 15-2268 of the Montana Act and deals with merger of a subsidiary corporation into the parent. This section permits such a merger to occur without shareholder approval if a certain percentage of the stock of the subsidiary is already held by the parent. Prior to 1969 the Model Act required 95% ownership by the parent of stock of the subsidiary. This is presently required in Montana. The 1969 amendments to the Model Act reduced the requisite percentage to 90%.

The only reason stated for the reduction is to provide more flexibility in the relationship between the parent and the subsidiary. While the section itself does not expressly state whether dissenter rights are permitted, nonetheless the commentary indicates that at least shareholders of the subsidiary are entitled to dissent and receive the fair value of their shares in cash. The commentary states that this right is implied from the broad language of Model Act Sections 80 and 81, which is the appraisal remedy section of the Act. The commentary, however, points out that shareholders of the parent would not have dissenter privileges in this kind of transaction for the reason that the shareholders of the parent would not be materially affected by such a merger.

V. PROVISIONS DEALING WITH SALE OF ASSETS
(Sections 78-81)

Sections 78 and 79 of the Model Act regulate the sale of corporate assets from the corporation in two separate instances. Section 78 deals with those sales of assets which are in the regular course of business and the mortgage or pledge of assets in the regular and irregular course of business. Section 79 deals with the sale of assets other than

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154 MODEL ACT § 75; R.C.M. 1947, § 15-2268.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
in the regular course of business.\textsuperscript{162} The Montana counterpart of Section 78 appears at Section 15-2271,\textsuperscript{163} while the Section 79 counterpart appears at Section 15-2272.\textsuperscript{164} The basic distinction between Section 78 and 79 of the Model Act is that a sale or other transfer of assets in the regular course of business and even a mortgage or pledge of assets other than in the regular course of business, does not require shareholder approval, while sale under Section 79, which would be other than in the ordinary course of business, requires shareholder approval.

In 1969, the Montana legislature amended Section 15-2272 to permit a corporation to amend its articles of incorporation to allow the board of directors to sell, lease or exchange all, or substantially all, of its assets. The impact of this amendment appears to bypass shareholder approval of such a transaction if preexisting article authority to do so is present. This amendment also raises the question of whether a sale or lease under this limited situation would be subject to the appraisal remedy afforded to dissenting shareholders under applicable provisions of Montana law.\textsuperscript{165} Montana law does not permit an appraisal remedy for amendments to the articles of incorporation. Section 15-2274 of the Montana Act applies to the dissent procedure and requires as a condition precedent to any dissenter remedy the filing of a written objection to the proposed corporate action with the directors prior to their vote.\textsuperscript{166}

Since the appraisal remedy does not apply to amendments to the articles, and if the amendment to Section 15-2272 precludes the necessity of a shareholder action if the articles were amended to permit a sale or transfer of all, or substantially all, of the corporate assets not in the ordinary course of business, it is doubtful that the dissenting shareholder can force the corporation to purchase his shares in this situation.\textsuperscript{167} This seems obvious because the presence of a preexisting article provision authorizing such a transaction by the board obviates the necessity for shareholder action which raises serious doubts about the availability of the appraisal remedy for a disgruntled shareholder. Absent any prior article authority any sale which is other than in the ordinary course of business would require shareholder approval.

The 1969 amendment to the Model Act changed the necessary shareholder vote from two-thirds to a majority which is consistent with similar changes in the Model Act in 1969 regarding amendment of the articles of incorporation.\textsuperscript{168} The commentary employs the same reason-
ing here as it does in its commentary to the amendment of articles prov-

ison; namely, the need to conform to the more prevailing view. The only other point of difference between Montana and the Model Act is that Montana does not expressly include any obligations or securities other than share of another corporation as consideration.

Section 80 of the Model Act deals with right of shareholders to dissent. The similar Montana provision is Section 15-2273. Montana's section is comparable except that it does not contain the newer Model Act provision which excludes from the right to dissent holders of shares of a corporation which are listed on a national securities exchange and whose articles of incorporation do not give dissenter remedies to shareholders of such listed shares. Montana also excludes dissenter rights in connection with the merger of a wholly-owned subsidiary into a parent corporation. In all other respects Montana follows the Model Act provision and permits the dissenter remedy to apply to any plan of merger or consolidation, as well as the sale, or exchange of all, or substantially all, of the assets of the corporation other than in the usual and regular course of business.

VI. PROVISIONS DEALING WITH DISSOLUTION (Sections 82-105)

Section 82 of the Model Business Corporation Act deals with voluntary dissolution by the incorporators. Its counterpart is in Section 15-2275 of the Montana Act. Montana has the pre-1969 provision which varies from the new Model Act in the voluntary dissolution is impermissible if the corporation has been in existence for two years or more. The 1969 amendment to the Model Act deleted the provision limiting the power of the incorporators to dissolve the corporation during the first two years of corporate existence. The Model Act simply places no time limit and permits the incorporators to dissolve the corporation if it has never issued any stock and has not commenced business at any time after incorporation. The commentary to the Model Act gives no reason for the deletion of the two-year prescriptive period.

Model Act Section 84 deals with voluntary dissolution by act of the corporation. Its Montana counterpart is in Section 15-2277 and is comparable except that such action requires a two-thirds vote of the

169 Model Act Ann. 2d at 417.
171 Model Act § 80.
172 Model Act § 82.
174 Id.
175 Model Act § 82.
176 Id.
177 Model Act § 84.
shareholders in a Montana corporation, while the Model Act requires only a simple majority. The Model Act section was amended in 1969, along with several other provisions regarding shareholder vote requirements, reducing such requirements from two-thirds to a majority. The discussion above concerning amendments to the articles of incorporation is similarly applicable here.

Section 89 of the Model Act which deals with revocation of voluntary dissolution proceedings by act of the corporation varies from the Montana Act Section 15-2282. Montana requires two-thirds vote of the shareholders, while the Model Act requires only a majority.

Sections 92 and 93 of the Model Act deal with the articles of dissolution and their filing. Their Montana counterparts are found in Sections 15-2285 and 15-2286 respectively of the Montana Act. Montana's provisions are comparable to the Model Act except that Montana provides that a court order is not necessary for voluntary dissolution. The Montana Act adds a specific local requirement requiring a certificate to be obtained from the State Department of Revenue indicating that all taxes have been paid before articles of dissolution can be filed. In 1969 the Montana provision was amended by adding in the first sentence after the words "is terminated" the words "except a decree of involuntary dissolution in an action brought by the attorney general." Montana's provision, which is found in Section 15-2287, is comparable to the Model Act except that Montana does not recognize the failure to pay state "franchise" taxes as a ground for involuntary dissolution. Even though Montana does have a license tax instead of a franchise tax, it does not regard the failure to pay such tax as a basis for involuntary dissolution. In all other respects Montana's provision is comparable to the Model Act provision.

Section 95 of the Model Act obligates a secretary of state to give notice when a corporation has failed to file an annual report or pay its franchise taxes. It is comparable to Section 15-2288 of the Montana Act except that the Model Act uses the word "franchise," while the Montana version does not.

Section 104 of the Model Act deals with depositing amounts due

\[\text{MODEL ACT } \S 89; \text{ R.C.M. 1947, } \S 15-2282.\]
\[\text{MODEL ACT } \S\S 92, 93.\]
\[\text{R.C.M. 1947, } \S\S 15-2285 \text{ and 15-2286.}\]
\[\text{R.C.M. 1947, } \S\S 15-2285 \text{ and 15-2286.}\]
\[\text{R.C.M. 1947, } \S\S 15-2285 \text{ and 15-2286.}\]
\[\text{R.C.M. 1947, } \S 94.\]
\[\text{R.C.M. 1947, } \S 15-2287.\]
\[\text{MODEL ACT } \S 95.\]
\[\text{R.C.M. 1947, } \S 15-2288.\]
certain shareholders with the state treasurer.\textsuperscript{189} The Montana section governing these matters appears at Section 15-2297.\textsuperscript{190} Montana adds a specific provision allowing the state treasurer the alternative of disposing of the distributive portion as provided by the Uniform Disposition of Unclaimed Property Law.\textsuperscript{191} This section of the Model Act is regarded as a deposit rather than an escheat provision. Montana, instead, regards its provision as an escheat section.\textsuperscript{192}

Section 105 of the Model Act deals with survival of remedies after dissolution.\textsuperscript{193} Its counterpart appears in Section 15-2298 of the Montana Act.\textsuperscript{194} This section permits claims against the corporation, its directors, officers or shareholders to be prosecuted within a certain period of time after dissolution. Montana varies substantially from the Model Act in that it permits such claims to be brought within five years after dissolution if the claim existed prior to dissolution.\textsuperscript{195} The Model Act provision permits such claims to be brought only within two years after dissolution if the claim existed prior to dissolution.\textsuperscript{196} Other than this specific difference, Montana is comparable to the Model Act except for some relatively minor provisions regarding the preservation of remedies with regard to corporate property.

\textbf{VII. PROVISIONS DEALING WITH FOREIGN CORPORATIONS (Sections 106-124)}

Section 115 of the Model Act deals with service of process on a foreign corporation.\textsuperscript{197} The applicable Montana provision appears at Section 15-22-108.\textsuperscript{198} Montana varies substantially from the Model Act by subjecting service of process on a foreign corporation to the Montana Rules of Civil Procedure. Such rules permit service on any officer, director, superintendent, or statutory agent of the corporation. Also, Montana permits service on trustees and stockholders of unlicensed foreign corporations. Montana also requires the service of three copies of any notice, demand, or process be given to the secretary of state if the foreign corporation has appointed him agent. The Montana provisions also require supporting affidavits establishing that agents of the defendant corporation could not be found. The corporation’s last known address must also be published.\textsuperscript{199}

\textsuperscript{189}MODEL ACT § 104.
\textsuperscript{190}R.C.M. 1947, § 15-2297.
\textsuperscript{191}R.C.M. 1947, § 15-2297.
\textsuperscript{192}R.C.M. 1947, §§ 67-2201, 2230.
\textsuperscript{193}MODEL ACT § 105.
\textsuperscript{194}R.C.M. 1947, § 15-2298.
\textsuperscript{195}R.C.M. 1947, § 15-2298.
\textsuperscript{196}MODEL ACT § 105.
\textsuperscript{197}MODEL ACT § 115.
\textsuperscript{198}R.C.M. 1947, § 15-22-108.
\textsuperscript{199}R.C.M. 1947, § 15-22-108.
Section 116 of the Model Act deals with amendments to articles of incorporation of a foreign corporation, and a similar provision is found in the Montana Act at Section 15-22-109. While this provision is comparable to the Model Act it varies from the Model Act by not expressly prohibiting the filing as authorization for the foreign corporation to change its name. Montana also requires 60 days notice of such amendment while the Model Act requires only 30 days notice.

Section 117 of the Model Act deals with mergers of foreign corporations authorized to transact business in this state. The applicable Montana provision appears at Section 15-22-110 and is comparable to the Model Act section, with the exception that Montana requires 60 days notice of such a merger while the Model Act requires only 30 days notice.

Sections 119 and 120 of the Model Act deal with withdrawal of a foreign corporation and the filing of an application for withdrawal of such corporation. Montana's provisions are comparable and appear at Sections 15-22-112 and 15-22-113 respectively. The only variation is that in Montana Subsections (f) through (i) do not appear, and in lieu thereof is a requirement that a tax clearance be obtained from the Department of Revenue.

Section 123 of the Model Act deals with application of provisions of the Model Act to corporations heretofore authorized to transact business in the state. Montana has a comparable provision and it is found in Section 15-22-116. It varies from the Model Act in that the Act would not have had any application to any corporation authorized to transact business in the state before July 1, 1967, until after January 1, 1969. The effect of this provision is that today all corporations existing as duly licensed foreign corporations in the state before July 1, 1967, must now be in compliance with the applicable provisions of the Montana Act if they are remaining in the state.

VIII. PROVISIONS DEALING WITH ANNUAL REPORTS

(Sections 125-126)

No changes.

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200 Model Act § 116.
203 Model Act § 117.
205 Model Act §§ 119 and 120.
208 Model Act § 123.
IX. PROVISIONS DEALING WITH FEES, TAXES, AND CHARGES
(Sections 127-134)

Section 130 of the Model Act deals with license fees payable by a domestic corporation. The comparable Montana version appears in Section 15-22-122. Montana is different from most other states in that while it calculates the applicable fee on the number of authorized shares of the corporation, it adds a special exception by permitting each one-hundred-dollar unit of authorized par-value shares as counting as only one taxable share for license tax purposes only. Montana does not require a minimum fee and makes assumptions about the value of no-par stock for tax purposes which is consistent with many other states.

Section 131 of the Model Act deals with license fees payable by foreign corporations. The Montana provision appears at Section 15-22-124 and varies substantially from the Model Act. Unlike the Model Act, Montana provides for an initial or basic fee, as well as an additional license fee based upon the proration between corporate property located in the state and its relationship to the total assets of the foreign corporation. Montana also calculates the fee on the basis of the relationship between annual gross receipts from business transacted in the state compared to all gross receipts of the foreign corporation. The Model Act provides for a license fee on the authorized shares of the foreign corporation.

Sections 132 through 134 inclusive of the Model Act deal with franchise taxes. Montana has no similar provision, since in lieu of franchise taxes, Montana charges a license tax based upon the corporation's net income which is covered by special provisions of the Montana revenue code.

X. PROVISIONS DEALING WITH PENALTIES
(Sections 135-136)

Sections 135 and 136 of the Model Act deal with the penalties imposed upon corporations and officers and directors, respectively. Montana provides for similar penalties, but in a manner completely different from the requirements of the Model Act. The Montana provisions are found at Section 15-22-125 and 15-22-126. Montana specifically classifies as a misdemeanor the failure or refusal to file an annual report after demand. The corporation is subject to a maximum fine of

\[\text{Montana Law Review, Vol. 36 [1975], Iss. 1, Art. 3} \]
$500.218 Officers or directors who file false information are subject to the same fine.219 The significant difference between Montana and the Model Act on this point is that all Model Act penalties are related to franchise tax provisions. Montana's penalties do not relate to franchise taxes because no provision is made for them in the applicable law.

XI. MISCELLANEOUS PROVISIONS (Sections 137-152)

Section 137 of the Model Act is a provision dealing with interrogatories by the secretary of state.220 Montana has not adopted Section 137 nor the companion Section 138, dealing with information disclosed by interrogatories.221 The purpose of these sections is to give the secretary of state administrative power to direct interrogatories to any corporation, domestic or foreign, which is subject to the provisions of the Act, to enable him to ascertain whether such corporation has complied with all provisions of the Act applicable to the corporation. The commentary to the section of the Model Act indicates that this provision is a statutory outgrowth of the general corporation statute and is a logical accompaniment of the administrative powers and duties lodged by the Act in the secretary of state.222

Section 141 of the Model Act deals with certificates and certified copies to be received in evidence.223 The Montana counterpart of this section appears at Section 15-22-130.224 Both acts provide a method whereby all courts, public offices, and official bodies may receive as prima facie evidence of the facts therein stated, copies of documents which are on file in the secretary of state's office when certified by him. Montana limits the second sentence of the provision to patent facts relating to the corporation only. It purports to exclude other facts which may appear on the face of the document, but lacking in relevance to the corporation.

Section 142 of the Model Act deals with provision of forms by the secretary of state.225 Montana varies substantially from the Model Act in that it limits the power of the secretary of state to issue forms only for reports required by the act to be filed in the office of the secretary of state. The Montana version deletes the second sentence of the Model Act provision which would permit the secretary of state to provide forms for all other documents to be filed in his office. Presumably the

220MODEL ACT § 137.
221MODEL ACT § 138.
2222 MODEL ACT ANN. 2d at 861.
223MODEL ACT § 141.
225MODEL ACT § 142.
Montana legislature did not wish the secretary of state to be providing forms for such things as articles, bylaws, and similar documents. The rationale for this deletion appears to preclude the issuance of forms for corporations to those not qualified to practice law in the state of Montana. The comparable Montana provision appears in Section 15-22-131.228

Section 145 of the Model Act deals with action by shareholders without a meeting.227 As previously discussed, the comparable provision for this section appears in Section 15-22-134 and permits action by both shareholders and directors without a meeting.228 Both kinds of actions, whether they be shareholder or director action, can be consumated without a meeting as long as there is unanimous consent by all members of the affected group.

Section 146 of the Model Act is entitled “Unauthorized Assumption of Corporate Powers.”229 Montana follows the Model Act but adds an additional sentence regarding estoppel in Section 15-22-135.230 The added portion in the Montana version requires that anyone who assumes an obligation to an ostensible corporation cannot resist the obligation on the ground that there was in fact no such corporation until that fact has been adjudged in a direct proceeding for that purpose. The added portion in the Montana version is unique among the states adopting the Model Act as well as all non-Model Act jurisdictions.

Sections 50 and 146 of the Model Act when taken together were designed to avoid the problems created by a pseudo-corporation which purported to act as a corporation when, unknown to its shareholders, one or more of the technical conditions precedent to incorporation was lacking. At common law, courts recognized a pseudo-corporation as a “de facto” corporation when the organizers had made some colorable attempt to incorporate under an appropriate law and had held themselves out as a corporation in innocent reliance on such assumption.

The purpose of including these sections in the Model Act is to remove these “creatures” of judicial interpretation from the law entirely. The needless distinction between de jure, de facto, and corporations by estoppel has been repeatedly criticized and one writer has called such doctrines “legal conceptualism at its worst.”231 Under these provisions of the Model Act, corporate existence does not begin until the certificate of incorporation issues (Section 50) and until that time all those who assume to act as a corporation are jointly and severally liable for all debts and obligations resulting from such actions. The leading case

interpreting these sections is *Robertson v. Levy*. Robertson interprets these provisions together as abolishing both the de facto and corporations by estoppel doctrines. It seems that by the addition of the second clause of R.C.M. 15-22-135 Montana has resurrected the doctrine of corporation by estoppel.

**CONCLUSION**

Part I of this article has reviewed in a summary fashion the differences between the Montana Business Corporations Act and the amended Model Corporations Act. Part II, which will appear in the next issue of this publication, will discuss in greater detail the Model Act amendments which require special consideration by Montana.