

ARTICLE 11

Business Corporations; Substantive Provisions

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53-11-1. Short title.

Chapter 53, Articles 11 through 18 NMSA 1978 may be cited as the "Business Corporation Act".

53-11-2. Definitions.

As used in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978], unless the text otherwise requires:

- A. "corporation" or "domestic corporation" means a corporation for profit subject to the provisions of the Business Corporation Act, except a foreign corporation;
- B. "foreign corporation" means a corporation for profit organized under laws other than the laws of this state for a purpose for which a corporation may be organized under the Business Corporation Act;
- C. "articles of incorporation" means the original or restated articles of incorporation or articles of consolidation and all amendments thereto, including articles of merger;
- D. "shares" means the units into which the proprietary interests in a corporation are divided;
- E. "subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation;
- F. "shareholder" means one who is a holder of record of shares in a corporation;
- G. "authorized shares" means the shares of all classes which the corporation is authorized to issue;

H. "annual report" means the corporate report required by the Corporate Reports Act [Chapter 53, Article 5 NMSA 1978] ;

I. "distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness, by a corporation to or for the benefit of any of its shareholders in respect of any of its shares, whether by dividend or by purchase redemption or other acquisition of its shares, or otherwise;

J. "franchise tax" means the franchise tax imposed by the Corporate Income and Franchise Tax Act [Chapter 7, Article 2A NMSA 1978];

K. "fees" means the fees imposed by Section 53-2-1 NMSA 1978;

L. "commission" means the public regulation commission [secretary of state] or its delegate;

M. "address" means:

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

N. "delivery" means:

(1) if personally served, the date on which the documentation is received by the corporations bureau of the commission; and

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

53-11-3. Purposes.

Corporations may be organized under the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] for any lawful purpose or purposes, except banking, insurance, credit unions, savings and loan associations, railroads and waterworks organized under the Laws of 1887, Chapter 12.

53-11-4. General powers.

Each corporation has power to:

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

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

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

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

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

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

G. purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, limited partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

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

- I. lend money for its corporate purposes, invest and reinvest its funds and take and hold real and personal property as security for the payment of funds so loaned or invested;
- J. conduct its business, carry on its operations, have offices and exercise the powers granted by the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] within or without this state;
- K. elect or appoint directors, officers and agents of the corporation, and define their duties and fix their compensation;
- L. make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation;
- M. make donations for the public welfare or for charitable, scientific, educational or governmental purposes;
- N. transact any lawful business in aid of governmental policy;
- O. pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, stock option plans and other incentive plans for any or all of its directors, officers and employees;
- P. be a promoter, partner, member, associate, trustee or manager of any partnership, joint venture, trust or other enterprise;
- Q. resist a change or potential change in control of the corporation if the directors by a majority vote of a quorum determine that the change or potential change is opposed to or not in the best interest of the corporation upon consideration of the interests of the corporation's shareholders and any of the matters set forth in Subsection D of Section 53-11-35 NMSA 1978; and
- R. have and exercise all powers necessary or convenient to effect its purposes.

53-11-4.1. Indemnification of directors and officers.

A. As used in this section:

- (1) "director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation or nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust;
- (2) "corporation" includes any domestic or foreign predecessor entity of the corporation in a merger, consolidation or other transaction in which the predecessor's existence ceased upon consummation of such transaction;
- (3) "expenses" include attorneys' fees;
- (4) "official capacity" means:
 - (a) when used with respect to a director, the office of director in the corporation; and
 - (b) when used with respect to a person other than a director, as contemplated in Subsection I of this section, the elective or appointive office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the corporation, but in each case does not include service for any other foreign or domestic corporation or nonprofit corporation, or any cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust;
- (5) "party" includes a person who was, is or is threatened to be made, a named defendant or respondent in a proceeding; and
- (6) "proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative.

B. A corporation shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a director if:

- (1) the person acted in good faith;
- (2) the person reasonably believed:
 - (a) in the case of conduct in the person's official capacity with the corporation, that the person's conduct was in its best interests; and

(b) in all other cases, that the person's conduct was at least not opposed to its best interests; and

(3) in the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful. Indemnification may be made against judgments, penalties, fines, settlements and reasonable expenses, actually incurred by the person in connection with the proceeding; except that if the proceeding was by or in the right of the corporation, indemnification may be made only against such reasonable expenses and shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the corporation. The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person did not meet the requisite standard of conduct set forth in this subsection.

C. A director shall not be indemnified under Subsection B of this section in respect of any proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director shall have been adjudged to be liable on the basis that personal benefit was improperly received by the director.

D. Unless limited by the articles of incorporation:

(1) a director who, in the opinion of the board of directors reasonably based on the facts, circumstances and outcome of the proceeding, has been wholly successful, on the merits or otherwise, in the defense of any proceeding referred to in Subsection B of this section shall be indemnified against reasonable expenses incurred by the director in connection with the proceeding; or

(2) a court of appropriate jurisdiction, upon application of a director and such notice as the court shall require, shall have authority to order indemnification in the following circumstances:

(a) if it determines a director is entitled to reimbursement under Paragraph (1) of this subsection, the court shall order indemnification, in which case the director shall also be entitled to recover the reasonable expenses of securing such reimbursement; or

(b) if it determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director has met the standard of conduct set forth in Subsection B of this section or has been adjudged liable in the circumstances described in Subsection C of this section. The court may order such indemnification except that indemnification with respect to any proceeding by or in the right of the corporation or in which liability shall have been adjudged in the circumstances described in Subsection C of this section shall be limited to reasonable expenses. A court of appropriate jurisdiction may be the same court in which the proceeding involving the director's liability took place.

E. No indemnification under Subsection B of this section shall be made by the corporation unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in Subsection B of this section. Such determination shall be made:

(1) by the board of directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) if such a quorum cannot be obtained, by a majority vote of a committee of the board duly designated to act in the matter by a majority vote of the full board, in which designation directors who are parties may participate, and consisting solely of two or more directors not at the time parties to the proceeding;

(3) by special legal counsel, selected by the board of directors or a committee thereof by vote as set forth in Paragraph (1) or (2) of this subsection or, if the requisite quorum of the full board cannot be obtained therefor and such committee cannot be established, by a majority vote of the full board, in which selection directors who are parties may participate; or

(4) by the shareholders.

Authorization of indemnification and determination as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, ex-

cept that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses shall be made in a manner specified in Paragraph (3) of Subsection E of this section for the selection of such counsel. Shares held by directors who are parties to the proceeding shall not be voted on the subject matter under this subsection.

F. Reasonable expenses incurred by a director who is a party to a proceeding may be paid or reimbursed by the corporation in advance of the final disposition of such proceeding if:

(1) the director furnishes the corporation a written affirmation of his good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation as authorized in this section;

(2) the director furnishes the corporation a written undertaking by or on behalf of the director to repay such amount if it shall ultimately be determined that the director has not met such standards of conduct; and

(3) a determination is made that the facts then known to those making the determination would not preclude indemnification under this section.

The undertaking required by Paragraph (2) of this subsection shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment. Determinations and authorizations of payments under this subsection shall be made in the manner specified in Subsection E of this section.

G. The indemnification authorized by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under the articles of incorporation, the bylaws, an agreement, a resolution of shareholders or directors or otherwise, both as to action in an official capacity and as to action in another capacity while holding such office, shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

H. For purposes of this section, the corporation shall be deemed to have requested a director to serve an employee benefit plan whenever the performance by the director of duties to the corporation also imposes duties on, or otherwise involves services by, the director to the plan or participants or beneficiaries of the plan; excise taxes assessed on a director with respect to an employee benefit plan pursuant to applicable law shall be deemed "fines"; and action taken or omitted by the director with respect to an employee benefit plan in the performance of duties for a purpose reasonably believed by the director to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose which is not opposed to the best interests of the corporation.

I. Unless limited by the articles of incorporation:

(1) an officer of the corporation shall be indemnified as and to the same extent provided in Subsection D of this section for a director and shall be entitled to the same extent as a director to seek indemnification pursuant to the provisions of that subsection;

(2) a corporation shall have the power to indemnify and to advance reasonable expenses to an officer, employee or agent of the corporation to the same extent that it may indemnify and advance reasonable expenses to directors pursuant to this section; and

(3) a corporation, in addition, shall have the power to indemnify and to advance reasonable expenses to an officer, employee or agent who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

J. A corporation shall have power to purchase and maintain insurance or furnish similar protection, including but not limited to providing a trust fund, a letter of credit or self-insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation or nonprofit corporation, cooperative, partnership, joint venture, trust, other incorporated or unincorporated enterprise or employee benefit plan or trust, against any liability asserted against and incurred by the person in any such capacity or arising out of the person's status as such, whether or not the corporation

would have the power to indemnify the person against such liability under the provisions of this section.

K. Any indemnification of, or advance of expenses to, a director in accordance with this section, if arising out of a proceeding by or in the right of the corporation, shall be reported in writing to the shareholders with or before the notice of the next shareholders' meeting.'

53-11-5. Power of corporation to acquire its own shares.

A. As used in this section, "treasury shares" means shares of a corporation issued and subsequently acquired by the corporation but that have not been restored to the status of unissued shares.

B. A corporation has the power to purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of and to pledge, use and otherwise deal in and with its own shares.

C. Treasury shares do not carry voting rights or participate in distributions, may not be counted as outstanding shares for any purpose and may not be counted as assets of the corporation for the purpose of computing the amount available for distributions. Unless the articles of incorporation provide otherwise, treasury shares may be retired and restored to the status of authorized and unissued shares without an amendment to the articles of incorporation or may be disposed of for such consideration as the board of directors may determine.

D. This section does not limit the right of a corporation to vote its shares held by it in a fiduciary capacity.

E. If the articles of incorporation provide that treasury shares that are retired shall not be reissued, the authorized shares shall be reduced by the number of treasury shares retired.

F. If the number of authorized shares is reduced by a retirement of treasury shares, the corporation shall, on or before the time for filing its next corporate report under the Corporate Reports Act [Chapter 53, Article 5 NMSA 1978] with the commission [secretary of state], file a statement of reduction showing the reduction in the authorized shares. The statement of reduction shall be executed by the corporation by an officer of the corporation and shall set forth:

- (1) the name of the corporation;
- (2) the number of authorized shares reduced, itemized by classes and series; and
- (3) the aggregate number of authorized shares, itemized by classes and series, after giving effect to such reduction.

53-11-6. Defense of ultra vires.

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation is invalid because the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

A. in a proceeding by a shareholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of the contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of the contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

B. in a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation; or

C. in a proceeding by the attorney general, as provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978], to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from the transaction of unauthorized business.

53-11-7. Corporate name.

A. The corporate name shall:

(1) contain the separate word "corporation," "company," "incorporated" or "limited" or shall contain a separate abbreviation of one of these words;

(2) not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation; and

(3) not be the same as, or confusingly similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978], or the name of a corporation which has in effect a registration of its corporate name as provided in the Business Corporation Act.

B. Paragraph (3) of Subsection A of this section shall not apply if the applicant files with the commission [secretary of state] either:

(1) the written consent of such other corporation or holder of a reserved or registered name to use the same or confusingly similar name and one or more words are added to make the name distinguishable from the other name; or

(2) a certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of the name in this state.

53-11-8. Reserved name.

A. The exclusive right to the use of a corporate name may be reserved by:

(1) any person intending to organize a corporation under the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978];

(2) any domestic corporation intending to change its name;

(3) any foreign corporation intending to make application for a certificate of authority to transact business in this state;

(4) any foreign corporation authorized to transact business in this state and intending to change its name; or

(5) any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this state.

B. The reservation shall be made by filing with the commission [secretary of state] an application to reserve a specified corporate name, executed by the applicant. If the commission [secretary of state] finds that the name is available for corporate use, it shall reserve the name for the exclusive use of the applicant for a period of one hundred and twenty days.

C. The right to the exclusive use of a specified corporate name so reserved may be transferred to any other person or corporation by filing in the office of the commission [secretary of state] a notice of transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee.

53-11-9. Registered name.

A. Any foreign corporation not authorized to transact business in this state may register its corporate name under the Business Corporation Act [Chapter 53, Articles 11 to 18

NMSA 1978] if its corporate name is not the same as, or confusingly similar to, the name of any domestic corporation existing under the laws of this state, or the name of any foreign corporation authorized to transact business in this state, or any corporate name reserved or registered under the Business Corporation Act.

B. Registration shall be made by:

(1) filing with the commission [secretary of state]:

(a) an application for registration executed by the corporation by an officer thereof, setting forth the name of the corporation, the state or territory under the laws of which it is incorporated, the date of its incorporation, a statement that it is carrying on or doing business, and a brief statement of the business in which it is engaged; and

(b) a certificate setting forth that the corporation is in good standing under the laws of the state or territory in which it is organized, executed by the secretary of state of the state or territory or by the official who may have custody of the records pertaining to corporations; and

(2) paying to the commission [secretary of state] a registration fee in the amount of one dollar (\$1.00) for each month, or fraction thereof, between the date of filing the application and December 31 of the calendar year in which the application is filed.

C. Registration shall be effective until the close of the calendar year in which the application for registration is filed.

53-11-10. Renewal of registered name.

A corporation which has in effect a registration of its corporate name, may renew the registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration and a certificate of good standing as required for the original registration and by paying a fee of ten dollars (\$10.00). A renewal application may be filed between October 1 and December 31 each year, and shall extend the registration for the following calendar year.

53-11-11. Registered office and registered agent.

Each corporation shall have and continuously maintain in this state:

A. a registered office which may be, but need not be, the same as its place of business; and

B. a registered agent, which agent may be either an individual resident in this state whose business office is identical with the registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with the registered office.

53-11-12. Failure to appoint and maintain registered agent; penalty; reinstatement.

A. If a corporation fails for a period of thirty days to file the corporate reports required pursuant to Section 53-5-2 NMSA 1978 or to appoint and maintain a registered agent in this state or has failed for thirty days after change of its registered office or registered agent to file in the office of the commission [secretary of state] a statement of the change, the commission [secretary of state] shall notify the corporation of its delinquency by letter to the corporation's principal office. If the delinquency is not corrected within sixty days from the date the letter is mailed, the commission [secretary of state] shall issue a certificate of revocation that recites the grounds for revocation and its effective date.

B. A corporation administratively revoked pursuant to this section may apply to the commission [secretary of state] for reinstatement within two years after the effective date of revocation. The application shall:

(1) recite the name of the corporation and the effective date of its administrative revocation;

(2) state that the ground or grounds for revocation either did not exist or have been eliminated; and

(3) state that the corporation's name satisfies the requirements of Section 53-11-7 NMSA 1978.

C. If the commission [secretary of state] determines that the application contains the information required by Subsection B of this section and that the information is correct, it shall cancel the certificate of revocation and prepare a certificate of reinstatement that recites its determination and the effective date of reinstatement, file the original of the certificate and serve a copy on the corporation.

D. When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative revocation and the corporation resumes carrying on its business as if the administrative revocation had never occurred.

53-11-13. Change of registered office or registered agent.

A. A corporation may change its registered office or change its registered agent, or both, upon filing in the office of the public regulation commission [secretary of state] a statement setting forth:

(1) the name of the corporation;

(2) the address of its registered office;

(3) if the address of its registered office is to be changed, the address to which the registered office is to be changed;

(4) the name of its registered agent;

(5) if its registered agent is to be changed:

(a) the name of its successor registered agent; and

(b) a statement executed by the successor registered agent acknowledging his acceptance of the appointment by the filing corporation as its registered agent, if the agent is an individual, or a statement executed by an authorized officer of a corporation that is the successor registered agent in which the officer acknowledges the corporation's acceptance of the appointment by the filing corporation as its registered agent, if the agent is a corporation; and

(6) that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

B. The statement shall be executed by the corporation by an authorized officer and delivered to the public regulation commission [secretary of state]. If the commission [secretary of state] finds that the statement conforms to the provisions of the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978], it shall file the statement in its office, and, upon such filing, the change of address of the registered office or the appointment of a new registered agent, or both, as the case may be, becomes effective, and, upon filing, fulfills the requirement to file a supplemental report under Section 53-5-2 NMSA 1978.

C. Any registered agent of a corporation may resign upon filing a written notice of resignation with the public regulation commission [secretary of state]. The commission [secretary of state] shall mail a copy immediately to the corporation at its principal place of business as shown on the records of the commission [secretary of state]. The appointment of the resigning agent shall terminate upon the expiration of thirty days after receipt of the notice by the commission [secretary of state].

D. If a registered agent changes his business address to another place within the same county, he may change the address and the address of the registered office of any corporation of which he is the registered agent by filing a statement as required by this section except that it need be signed only by the registered agent, need not be responsive to Paragraph (5) of Subsection A of this section and shall recite that a copy of the statement has been mailed to the corporation.

E. If a registered agent changes the street address of the registered agent's business office, the registered agent may change the street address of the registered office of any corporation for which the registered agent is the registered agent by notifying the corporation in writing of the change and signing, either manually or in facsimile, and delivering to the public regulation commission [secretary of state] for filing a statement that complies with the requirements of Subsection A of this section, and recites that the corporation has been notified of the change.

53-11-14. Service of process on corporation.

The registered agent appointed by a corporation shall be an agent of the corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served. Nothing in this section limits or affects the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

53-11-15. Authorized shares.

A. Each corporation has power to create and issue the number of shares stated in its articles of incorporation. The shares may be divided into one or more classes with the designation, preferences, limitations and relative rights stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of, or provide special voting rights for, the shares of any class to the extent not inconsistent with the provisions of the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978].

B. Without limiting the authority granted in this section, a corporation, when so provided in its articles of incorporation, may issue shares of preferred or special classes:

- (1) subject to the right of the corporation to redeem any of the shares at the price fixed by the articles of incorporation for the redemption thereof;
- (2) entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends;
- (3) having preference over any other class or classes of shares as to the payment of dividends;
- (4) having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation; or
- (5) convertible into shares of any other class or into shares of any series of the same or any other class, except a class having prior or superior rights and preferences as to dividends or distribution of assets upon liquidation.

53-11-15.1. Shares held for account.

If the articles of incorporation or the bylaws so provide, the board of directors may adopt by resolution a procedure whereby a shareholder of the corporation may certify in writing to the corporation that all or a portion of the shares registered in the name of such shareholder are held for the account of a specified person or persons. The resolution shall set forth:

- A. the classification of shareholder who may certify;
- B. the purpose or purposes for which the certification may be made;
- C. the form of certification and information to be contained therein;
- D. if the certification is with respect to a record date or closing of the stock transfer books within which the certification must be received by the corporation; and
- E. such other provisions with respect to the procedure as are deemed necessary or desirable. Upon receipt by the corporation of a certification complying with the procedure, the persons specified in the certification shall be deemed, for the purpose or purposes set forth in the certification, to be the holders of record of the number of shares specified in place of the shareholder making the certification.

53-11-16. Issuance of shares of preferred or special classes in series.

A. If the articles of incorporation so provide, the shares of any preferred or special class may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes. Any or all of the series of any such class and the variations in the relative rights and preferences as between different series may be fixed and determined by the articles of incorporation, but all shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

- (1) the rate of dividend;
- (2) whether shares may be redeemed and, if so, the redemption price and the terms and conditions of redemption;
- (3) the amount payable upon shares in event of voluntary and involuntary liquidation;
- (4) sinking fund provisions, if any, for the redemption or purchase of shares;
- (5) the terms and conditions, if any, on which shares may be converted; and
- (6) voting rights, if any.

B. If the articles of incorporation expressly vest authority in the board of directors, then to the extent that the articles of incorporation have not established series and fixed and determined the variations in the relative rights and preferences as between series, the board of directors may divide any or all of such classes into series and, within the limitations set forth in this section and in the articles of incorporation, fix and determine the relative rights and preferences of the shares of any series so established.

C. In order for the board of directors to establish a series, where authority to do so is contained in the articles of incorporation, the board of directors shall adopt a resolution setting forth the designation of the series and fixing and determining the relative rights and preferences thereof, or so much thereof as are not fixed and determined by the articles of incorporation.

D. Prior to the issue of any shares of a series established by resolution adopted by the board of directors, the corporation shall file in the office of the commission [secretary of state] a statement setting forth:

- (1) the name of the corporation;
- (2) a copy of the resolution establishing and designating the series, and fixing and determining the relative rights and preferences thereof;
- (3) the date of adoption of the resolution; and
- (4) that the resolution was duly adopted by the board of directors.

E. An original of the statement and a copy, which may be a photocopy of the original after it was signed or a photocopy that is conformed to the original, shall be executed by an authorized officer of the corporation and shall be delivered to the commission [secretary of state]. If the commission [secretary of state] finds that the statement conforms to law, it shall, when all fees have been paid:

- (1) endorse on the original and copy the word "filed", and the month, day and year of the filing thereof;
- (2) file the original in its office; and
- (3) return the copy to the corporation or its representative.

F. Upon the filing of such statement by the commission [secretary of state], the resolution establishing and designating the series and fixing and determining the relative rights and preferences thereof shall become effective and constitute an amendment of the articles of incorporation.

53-11-17. Subscriptions for shares.

A subscription for shares of a corporation to be organized shall be irrevocable for a period of six months, unless otherwise provided by the terms of the subscription agreement or unless all of the subscribers consent to the revocation of the subscription. Unless otherwise

provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as determined by the board of directors. Any call made by the board of directors for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be. In case of default in the payment of any installment or call when the payment is due, the corporation may proceed to collect the amount due in the same manner as any debt due the corporation. The bylaws may prescribe other penalties for failure to pay installments or calls that may become due, but no penalty working a forfeiture of a subscription, or of the amounts paid thereon, shall be declared as against any subscriber unless the amount due thereon remains unpaid for a period of thirty days after written demand has been made therefor. If mailed, the written demand shall be deemed to be made when deposited in the United States mail in a sealed envelope addressed to the subscriber at his last post-office address known to the corporation, with postage thereon prepaid. In the event of the sale of any shares by reason of any forfeiture, the excess of proceeds realized over the amount due and unpaid on the shares shall be paid to the delinquent subscriber or to his legal representative.

53-11-18. Issuance of shares.

A. Subject to any restrictions in the articles of incorporation, shares may be issued for such consideration as shall be authorized by the board of directors establishing a price (in money or other consideration) or a minimum price or general formula or method by which the price will be determined.

B. Upon authorization by the board of directors, the corporation may issue its own shares in exchange for or in conversion of its outstanding shares, or distribute its own shares, pro rata to its shareholders or the shareholders of one or more classes or series, to effectuate stock dividends or splits, and any such transaction shall not require consideration; provided, that no such issuance of shares of any class or series shall be made to the holders of shares of any other class or series unless it is either expressly provided for in the articles of incorporation, or is authorized by an affirmative vote or the written consent of the holders of at least a majority of the outstanding shares of the class or series in which the distribution is to be made.

53-11-19. Payment for shares.

A. The board of directors may authorize shares to be issued for consideration consisting of tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation.

B. Before the corporation issues shares, the board of directors shall determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid and nonassessable.

C. When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

D. The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid or the benefits received. If the services are not performed, the note is not paid or the benefits are not received, the shares escrowed or restricted and the distributions credited may be canceled in whole or part.

53-11-20. Stock rights and options.

Subject to any provisions in respect thereof set forth in its articles of incorporation, a corporation may create and issue, whether or not in connection with the issuance and sale of any of its shares or other securities, rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes. Such rights or options shall be evidenced in the manner approved by the board of directors and, subject to the provisions of the articles of incorporation, shall set forth the terms upon which, the time or times within which and the price or prices at which the shares may be purchased from the corporation upon the exercise of any such right or option. In the absence of fraud in the transaction, the judgment of the board of directors as to the adequacy of the consideration received for the rights or options is conclusive.

53-11-21. Repealed.**53-11-22. Expenses of organization, reorganization and financing.**

The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by the corporation, either out of the consideration received by it in payment for its shares, or by issuance of its shares, without thereby rendering the shares not fully paid.

53-11-23. Shares represented by certificates and uncertificated shares.

A. The shares of a corporation shall be represented by certificates or shall be uncertificated shares. Certificates shall be signed by the chairman or vice chairman of the board of directors or the president or a vice president and by the treasurer or an assistant treasurer, the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. Any or all of the signatures upon a certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon the certificate ceases to be an officer, transfer agent or registrar before the certificate is issued, it may be issued by the corporation with the same effect as if he were an officer, transfer agent or registrar at the date of its issue.

B. Every certificate representing shares issued by a corporation which is authorized to issue shares of more than one class shall set forth upon the face or back of the certificate, or shall state that the corporation will furnish to any shareholder upon request and without charge, a full statement of the designations, preferences, limitations and relative rights of the shares of each class authorized to be issued, and if the corporation is authorized to issue any preferred or special class in series, the variations in the relative rights and preferences between the shares of each series so far as the same have been fixed and determined and the authority of the board of directors to fix and determine the relative rights and preferences of subsequent series.

C. Each certificate representing shares shall state upon its face:

- (1) that the corporation is organized under the laws of this state;
- (2) the name of the person to whom issued; and
- (3) the number and class of shares, and the designation of the series, if any, which the certificate represents.

D. No certificate shall be issued for any share until the consideration established for its issuance is fully paid.

E. Unless otherwise provided by the articles of incorporation or bylaws, the board of directors of a corporation may provide by resolution that some or all of any or all classes and series of its shares shall be uncertificated shares, provided that such resolution shall not

apply to shares represented by a certificate until such certificate is surrendered to the corporation. Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the registered owner thereof a written notice containing the information required to be set forth or stated on certificates pursuant to Paragraphs (2) and (3) of Subsection C of this section. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated shares and the rights and obligations of the holders of certificates representing shares of the same class and series shall be identical.

53-11-24. Fractional shares.

A. A corporation may:

- (1) issue fractions of a share, either represented by a certificate or uncertificated;
- (2) arrange for the disposition of fractional interests by those entitled thereto;
- (3) pay in money the fair value of fractions of a share as of the time when those entitled to receive such fractions are determined; or
- (4) issue scrip in registered or bearer form which shall entitle the holder to receive a certificate for a full share or an uncertificated full share upon the surrender of such scrip aggregating a full share.

B. A certificate for a fractional share or an uncertificated fractional share shall, but scrip shall not unless otherwise provided therein, entitle the holder to exercise voting rights, to receive dividends thereon and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause scrip to be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares or uncertificated full shares before a specified date, or subject to the condition that the shares for which the scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of the scrip, or subject to any other conditions which the board of directors may deem advisable.

53-11-25. Liability of subscribers and shareholders.

A. A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to the shares other than the obligation to pay to the corporation the full consideration for which the shares were issued or to be issued.

B. No person who becomes an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall be personally liable to the corporation or its creditors for any unpaid portion of the consideration. No executor, administrator, conservator, guardian, custodian, trustee, assignee for the benefit of creditors or receiver shall be personally liable to the corporation as a holder of, or subscriber to, shares of a corporation but the estate and funds in his hands shall be so liable. No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

53-11-26. Shareholders' preemptive rights.

Except to the extent limited or denied by this section or by the articles of incorporation, shareholders shall have a preemptive right to acquire authorized but unissued shares, or securities convertible into such shares or carrying a right to subscribe to or acquire shares. Unless otherwise provided in the articles of incorporation:

A. holders of shares of any class that is preferred or limited as to dividends or assets shall not be entitled to any preemptive right;

B. holders of shares of common stock shall not be entitled to any preemptive right to shares of any class that is preferred or limited as to dividends or assets or to any obligations, unless convertible into shares of common stock or carrying a right to subscribe to or acquire shares of common stock;

C. holders of common stock without voting power shall have no preemptive right to shares of common stock with voting power; and

D. the preemptive right shall be only an opportunity to acquire shares or other securities under such terms and conditions as the board of directors may fix for the purpose of providing a fair and reasonable opportunity for the exercise of such right.

53-11-27. Bylaws.

The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless reserved to the shareholders by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

53-11-28. Meetings of shareholders.

A. Meetings of shareholders may be held at any place within or without this state in accordance with the bylaws. If no other place is designated in, or fixed in accordance with, the bylaws, meetings shall be held at the principal place of business of the corporation.

B. An annual meeting of the shareholders shall be held at the time designated in or fixed in accordance with the bylaws. If the annual meeting is not held within any thirteen-month period, the district court may, on the application of any shareholder, order a meeting to be held.

C. Special meetings of the shareholders may be called by the board of directors, the holders of not less than one-tenth of all the shares entitled to vote at the meeting or such other persons as may be authorized in the articles of incorporation or the bylaws.

53-11-29. Notice of shareholders' meetings.

Written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than fifty days before the date of the meeting, either personally or by mail, at the direction of the president, the secretary or the officer or persons calling the meeting, to each shareholder of record entitled to vote at the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the stock transfer books of the corporation, with postage thereon prepaid. Attendance of a shareholder in person or by proxy at a meeting constitutes a waiver of notice of the meeting, except where a shareholder attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

53-11-30. Closing of transfer books and fixing record date.

For the purpose of determining shareholders entitled to notice of, or to vote at, any meeting of shareholders or any adjournment thereof, or entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors of a corporation may provide that the stock transfer books shall be closed for a stated period not to exceed fifty days. If the stock transfer books are closed for the purpose of determining shareholders entitled to notice of, or to vote at, a meeting of shareholders, the books shall be closed for at least ten days immediately preceding the meeting. In lieu of closing the stock transfer books, the bylaws, or in the absence of an applicable bylaw, the board of directors may fix in advance a date as the record date for any such determination of shareholders, the date to be not more than fifty days and, in case of a meeting of shareholders, not less than ten days prior to the date on which the particular action, requiring such

determination of shareholders, is to be taken. If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of, or to vote at, a meeting of shareholders, or shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring the dividend is adopted, as the case may be, shall be the record date for the determination of shareholders. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, the determination shall apply to any adjournment thereof.

53-11-31. Voting list.

The officer or agent having charge of the stock transfer books for shares of a corporation shall make, at least ten days before each meeting of shareholders, a complete list of the shareholders entitled to vote at the meeting or any adjournment thereof, arranged in alphabetical order, with the address of, and the number of shares held by, each, which list, for a period of ten days prior to the meeting, shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. The list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original stock transfer books shall be prima facie evidence as to who are the shareholders entitled to examine the list or transfer books or to vote at any meeting of shareholders. Failure to comply with the requirements of this section does not affect the validity of any action taken at the meeting. An officer or agent having charge of the stock transfer books who fails to prepare the list of shareholders, or keep it on file for a period of ten days, or produce and keep it open for inspection at the meeting, as provided in this section is liable to any shareholder suffering damage on account of the failure, to the extent of the damage.

53-11-32. Quorum of shareholders.

Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting. A quorum, once attained at a meeting, shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough shares to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] or the articles of incorporation.

53-11-33. Voting of shares.

A. Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except as otherwise provided in the articles of incorporation. If the articles of incorporation provide for more or less than one vote for any share, on any matter, every reference in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] to a majority or other proportion of shares shall refer to such a majority or other proportion of votes entitled to be cast. The articles of incorporation may grant, either absolutely or conditionally to the holders of bonds, debentures or other obligations of the corporation the power to vote on specified matters, including the election of directors, and this right shall not be terminated except upon written assent of the holders of a majority in aggregate face amount of the bonds or debentures.

B. Shares held by another corporation, domestic or foreign, if a majority of the shares entitled to vote for the election of directors of the other corporation is held by the corporation,

shall not be voted at any meeting or counted in determining the total number of outstanding shares at any given time.

C. The articles of incorporation may provide that at each election for directors every shareholder entitled to vote at the election has the right to vote, in person or by proxy, the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of the candidates. A statement in the articles of incorporation that cumulative voting exists is sufficient to confer such right.

D. Shares standing in the name of another corporation, domestic or foreign, may be voted by the officer, agent or proxy as the bylaws of the other corporation may prescribe, or, in the absence of such provisions, as the board of directors of the other corporation may determine.

E. Shares held by an administrator, executor, guardian or conservator may be voted by him, either in person or by proxy, without a transfer of the shares into his name. Shares standing in the name of a trustee, or a custodian for a minor, may be voted by him, either in person or by proxy, but only after a transfer of the shares into his name.

F. A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney in fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

G. Shares standing in the name of a receiver or bankruptcy trustee may be voted by the receiver or bankruptcy trustee, and shares held by or under the control of a receiver or bankruptcy trustee may be voted by him without the transfer thereof into his name if authority so to do is contained in an appropriate order of the court by which the receiver or bankruptcy trustee was appointed.

H. A shareholder whose shares are pledged may vote the shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee may vote the shares so transferred.

I. Shares standing in the name of a partnership may be voted by any partner, and shares standing in the name of a limited partnership may be voted by any general partner.

J. Shares standing in the name of a person as life tenant may be voted by him, either in person or by proxy.

K. From the date on which written notice of redemption of redeemable shares has been mailed to the holders thereof and a sum sufficient to redeem the shares has been deposited with a bank or trust company with irrevocable instruction and authority to pay the redemption price to the holders thereof upon surrender of certificates therefor, the shares shall not be entitled to vote on any matter and shall not be deemed to be outstanding shares.

L. Without limiting the manner in which a shareholder may authorize another person or persons to act for the shareholder as proxy pursuant to Subsection F of this section, the following shall constitute valid means by which a shareholder may grant that authority:

(1) a shareholder may execute a writing authorizing another person or persons to act for that shareholder as proxy, and execution may be by the shareholder or the shareholder's authorized officer, director, employee or agent signing the writing or causing the person's signature to be affixed to the writing by any reasonable means, including by facsimile signature;

(2) a shareholder may authorize another person or persons to act for that shareholder as proxy by transmitting or authorizing the transmission of a telegram, cablegram, facsimile transmission, email or other means of electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive the transmission; provided that the electronic transmission shall either set forth, or be submitted with information from which it can be determined, that the electronic transmission was authorized by the shareholder. If it is determined that an electronic transmission is valid, the inspector, or if there is no inspector, the person making that determination, shall specify the information upon which he relied.

M. A copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to Subsection L of this section may be substituted or used in lieu of the original writing or transmission for any purpose for which the original writing or transmission could be used, if that copy, facsimile telecommunication or other reproduction is a complete reproduction of the entire original writing or transmission.

53-11-34. Voting trusts and agreements among shareholders.

A. Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to the trustee or trustees for the purposes of the agreement. The trustee or trustees shall keep a record of the holders of voting trust certificates evidencing a beneficial interest in the voting trust, giving the names and addresses of all such holders and the number and class of the shares in respect of which the voting trust certificates held by each are issued, and shall deposit a copy of such record with the corporation at its registered office. Failure to keep or deposit the record as required by this subsection does not affect the validity of the agreement or any action taken pursuant to it. Any trustee or trustees who fail to keep or deposit the record as required is liable to any holder of a voting trust certificate suffering damage on account of the failure to the extent of the damage. The counterpart of the voting trust agreement deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of record of voting trust certificates, either in person or by agent or attorney, at any reasonable time for any proper purpose.

B. Agreements among shareholders regarding the voting of their shares, which agreements are not voting trusts or purported voting trusts, shall not be subject to the provisions of Subsection A of this section and shall be valid and specifically enforceable.

53-11-35. Board of directors.

A. All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] or the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by the Business Corporation Act shall be exercised or performed to such extent and by such person or persons as provided in the articles of incorporation. Directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors. The board of directors may fix the compensation of directors unless otherwise provided in the articles of incorporation.

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

- (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
- (2) counsel, public accountants or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence; or

(3) a committee of the board upon which the director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs such duties shall have no liability by reason of being or having been a director of the corporation.

C. A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director's dissent shall be entered in the minutes of the meeting or unless the director shall file written dissent to such action with the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

D. For purposes of Subsection B of this section, a director, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:

- (1) the interests of the corporation's employees, suppliers, creditors and customers;
- (2) the economy of the state and nation;
- (3) the impact of any action upon the communities in or near which the corporation's facilities or operations are located; and
- (4) the long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation.

53-11-36. Number and election of directors.

The number of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the bylaws. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director. If the number of directors is not fixed by, or in the manner provided in, the bylaws or the articles of incorporation, the number shall be the same as the number of directors constituting the initial board of directors. The names and addresses of the members of the first board of directors shall be stated in the articles of incorporation. Such persons shall hold office until the first annual meeting of shareholders and until their successors have been elected and qualified. At the first annual meeting of shareholders and at each annual meeting thereafter, the shareholders shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors as permitted by the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978]. Each director shall hold office for the term for which the director is elected and until a successor has been elected and qualified.

53-11-37. Classification of directors.

When the board of directors consists of two or more members, in lieu of electing the whole number of directors annually, the articles of incorporation may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after the classification, the number of directors equal to the number of the class whose term expires at the time of the meeting shall be elected to hold office until the second succeeding annual meeting, if there are two classes,

or until the third succeeding annual meeting, if there are three classes. No classification of directors shall be effective prior to the first annual meeting of shareholders.

53-11-38. Vacancies.

Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

53-11-39. Removal of directors.

A. At a meeting of shareholders called expressly for that purpose, directors may be removed in the manner provided in this section. Except as provided in Subsection D of this section, a director or the entire board of directors may be removed, with or without cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

B. In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no one of the directors may be removed if the votes cast against his removal would be sufficient to elect him if then cumulatively voted at an election of the entire board of directors, or, if there are classes of directors, at an election of the class of directors of which he is a part.

C. Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the articles of incorporation, the provisions of this section apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

D. Unless the articles of incorporation provide otherwise, in the case of a corporation whose board is classified as provided in Section 53-11-37 NMSA 1978, shareholders may remove directors only for cause.

53-11-40. Quorum of directors.

A majority of the number of directors as fixed pursuant to Section 53-11-36 NMSA 1978 shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. A quorum, once attained at a meeting, shall be deemed to continue until adjournment notwithstanding the voluntary withdrawal of enough directors to leave less than a quorum. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

53-11-40.1. Director conflict of interest.

A. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved or ratified the transaction;

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction; or

(3) the transaction was fair to the corporation.

B. For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) another entity of which he is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

For purposes of this section, a director of the corporation does not have a direct or indirect interest in a transaction solely because the transaction may involve or effect a change in control of the corporation or his continuation in office as a director of that corporation.

C. For purposes of Paragraph (1) of Subsection A of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the affirmative vote of a majority of the directors on the board [of] directors or on a committee of the board of directors who have no direct or indirect interest in the transaction but a transaction may not be authorized, approved or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of or a vote cast by a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under Paragraph (1) of Subsection A of this section if the transaction is otherwise authorized, approved or ratified as provided in that subsection.

D. For purposes of Paragraph (2) of Subsection A of this section, a conflict of interest transaction is authorized, approved or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction and shares owned by or voted under the control of an entity described in Paragraph (2) of Subsection B of this section may not be counted in a vote of shareholders to determine whether to authorize, approve or ratify a conflict of interest transaction under Paragraph (2) of Subsection A of this section. The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978]. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

53-11-41. Executive and other committees.

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in the resolution or in the articles of incorporation or the bylaws of the corporation, shall have and may exercise all the authority of the board of directors, except that no such committee shall have authority to:

A. declare dividends or authorize distributions;

B. approve or recommend to shareholders actions or proposals required by this act to be approved by shareholders;

C. designate candidates for the office of director, for purposes of proxy solicitation or otherwise, or fill vacancies on the board of directors or any committee thereof;

D. amend the bylaws;

E. approve a plan of merger not requiring shareholder approval;

F. authorize or approve the reacquisition of shares unless pursuant to general formula or method specified by the board of directors; or

G. authorize or approve the issuance or sale of, or any contract to issue or sell, shares or designate the terms of a series of a class of shares, provided that the board of directors, having acted regarding general authorization for the issuance or sale of shares, or any con-

tract therefor, and, in the case of a series, the designation thereof, may, pursuant to a general formula or method specified by the board of resolution or by adoption of a stock option or other plan, authorize a committee to fix the terms of any contract for the sale of the shares and to fix the terms upon which such shares may be issued or sold, including, without limitation, the price, the dividend rate, provisions for redemption, sinking fund, conversion, voting or preferential rights, and provisions for other features of a class of shares, or a series of a class of shares, with full power in such committee to adopt any final resolution setting forth all the terms thereof and to authorize the statement of the terms of a series for filing with the commission [secretary of state] under this act. Neither the designation of any such committee, the delegation thereto of authority nor action by such committee pursuant to such authority shall alone constitute compliance by any member of the board of directors, not a member of the committee in question, with the director's responsibility to act in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.

53-11-42. Place and notice of directors' meetings; committee meetings.

Meetings of the board of directors, regular or special, or any committee designated thereby, may be held either within or without this state. Regular meetings of the board of directors or any committee designated thereby may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors or any committee designated thereby shall be held upon the notice prescribed in the bylaws. Attendance of a director at a meeting constitutes a waiver of notice of the meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors or any committee designated thereby need be specified in the notice or waiver of notice of the meeting unless required by the bylaws. Except as otherwise restricted by the articles of incorporation or bylaws, members of the board of directors or any committee designated thereby may participate in a meeting of the board or committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time and participation by such means shall constitute presence in person at a meeting.

53-11-43. Action by directors without a meeting.

Unless otherwise provided by the articles of incorporation or bylaws, any action required by the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] to be taken at a meeting of the directors of a corporation, or any action which may be taken at a meeting of the directors or of a committee, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the directors, or all of the members of the committee, as the case may be. The consent shall have the same effect as a unanimous vote.

53-11-44. Distributions to shareholders.

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

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

(2) the corporation's total assets would be less than the sum of its total liabilities and (unless the articles of incorporation otherwise permit) the maximum amount that then would be payable, in any liquidation, in respect of all outstanding shares having preferential rights in liquidation.

B. Determinations under Paragraph (2) of Subsection A of this section may be based upon:

(1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) a fair valuation or other method that is reasonable in the circumstances.

C. In the case of a purchase, redemption or other acquisition of a corporation's shares, the effect of a distribution shall be measured as of the date money or other property is transferred or debt is incurred by the corporation, or as of the date the shareholder ceases to be a shareholder of the corporation with respect to such shares, whichever is earlier. In all other cases, the effect of a distribution shall be measured as of the date of its authorization, or as of the date of payment if payment occurs more than one hundred twenty days following the date of authorization.

D. Indebtedness of a corporation incurred or issued to a shareholder in a distribution in accordance with this section shall be on a parity with the indebtedness of the corporation to its general unsecured creditors except to the extent subordinated by agreement.

E. In circumstances to which this section and related sections of the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] are applicable, such provisions supersede the applicability of any other statutes of this state with respect to the legality of distributions.

53-11-45. Repealed.

53-11-46. Liability of directors in certain cases.

A. In addition to any other liabilities, a director who votes for or assents to any distribution contrary to the provisions of the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] or contrary to any restrictions contained in the articles of incorporation shall, unless the director complies with the standard provided in the Business Corporation Act for the performance of the duties of directors, be liable to the corporation, jointly and severally with all other directors so voting or assenting, for the amount of the dividend which is paid or the value of the distribution in excess of the amount of the distribution which could have been made without a violation of the provisions of the Business Corporation Act or the restrictions in the articles of incorporation.

B. Any director against whom a claim is asserted under this section for the making of a distribution and who shall be held liable thereon, shall be entitled to contribution from the shareholders who accepted or received any such distribution, knowing the distribution to have been made in violation of the Business Corporation Act, in proportion to the amounts received by them.

C. Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from any other director who voted for or assented to the action upon which the claim is asserted and who did not comply with the standard provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] for the performance of the duties of directors.

53-11-47. Provisions relating to actions by shareholders.

A. No action shall be brought in this state by a shareholder in the right of a domestic or foreign corporation unless:

(1) the plaintiff was a shareholder of record or the beneficial owner of shares held by a nominee or the holder of voting trust certificates at the time of the transaction of which he

complains, or his shares or his beneficial ownership of shares held by a nominee or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder of record at such time;

(2) the complaint be verified; and

(3) the complaint alleges with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and the reasons for his failure to obtain the action or for not making the effort. If the corporation undertakes an investigation upon receipt of a demand by plaintiff for action, or following commencement of suit, the court may stay any action commenced as the circumstances reasonably require.

B. In any action hereafter instituted in the right of any domestic or foreign corporation by the person or persons described in the above paragraph, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action.

C. An action authorized by this section shall not be discontinued, compromised or settled without approval by the court having jurisdiction of the action. If the court determines that the interest of the shareholders or of any class thereof will be substantially affected by the discontinuance, compromise or settlement, the court may direct that notice, by publication or otherwise, be given to the shareholders or any class thereof whose interests it determines will be so affected.

53-11-48. Officers.

Every corporation organized under the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] shall have officers, with titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws, and as many officers as may be necessary to enable the corporation to sign instruments and stock certificates required under the Business Corporation Act. One of the officers shall have the duty to record the proceedings of the meetings of the members and directors in a book to be kept for that purpose. All officers and agents of the corporation, as between themselves and the corporation, shall have the authority and perform the duties in the management of the corporation as provided in the bylaws or as determined by resolution of the board of directors not inconsistent with the bylaws.

53-11-49. Removal of officers.

Any officer or agent may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed. Election or appointment of an officer or agent shall not of itself create contract rights.

53-11-50. Books and records; financial reports to shareholders; examination of records.

A. Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders and board of directors, and shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Any books, records and minutes may be in written form or in any other form capable of being converted into written form within a reasonable time.

B. Any person who shall have been a holder of record of shares or of voting trust certificates therefor at least six months immediately preceding his demand or who shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent

of all the outstanding shares of the corporation, upon written demand stating the purpose thereof, may examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes and record of shareholders and make extracts therefrom. Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder or holder of voting trust certificates, or his agent or attorney, to examine and make extracts from its books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to the shareholder or holder of voting trust certificates in a penalty of ten percent of the value of the shares owned by the shareholder, or in respect of which such voting trust certificates are issued, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has, within two years:

(1) sold or offered for sale any list of shareholders or of holders of voting trust certificates for shares of the corporation or any other corporation;

(2) aided or abetted any person in procuring any list of shareholders or of holders of voting trust certificates for any such purpose;

(3) improperly used any information secured through any prior examination of the books and records of account, or minutes, or records of shareholders or of holders of voting trust certificates for shares of the corporation or any other corporation; or

(4) not acted in good faith or for a proper purpose in making his demand.

C. Nothing in this section shall impair the power of any court of competent jurisdiction, upon proof by a shareholder or holder of voting trust certificates of proper purpose, irrespective of the period of time during which the shareholder or holder of voting trust certificates shall have been a shareholder of record or a holder of record of voting trust certificates, and irrespective of the number of shares held by him or represented by voting trust certificates held by him, to compel the production for examination by the shareholder or holder of voting trust certificates of the books and records of account, minutes and record of shareholders of a corporation.

D. Each corporation shall provide its shareholders access to at least a balance sheet as of the end of each taxable year and a statement of income for such taxable year, if the corporation prepares such financial statements for such taxable year for any purpose. Such financial statements may be consolidated statements of the corporation and one or more of its subsidiaries, but shall not be required to include the statements' supporting data or information.

53-11-51. Shares held for account.

A. If the articles of incorporation or the bylaws so provide, the board of directors may adopt by resolution a procedure whereby a shareholder of the corporation may certify in writing to the corporation that all or a portion of the shares registered in the name of such shareholder are held for the account of a specified person or persons. The resolution shall set forth:

(1) the types or groups of shareholders who may certify;

(2) the purpose or purposes for which the certification may be made;

(3) the form of certification and information to be contained therein;

(4) the deadline, if any, within which the certification must be received by the corporation; and

(5) such other provisions with respect to the procedure as are deemed necessary or desirable.

B. Upon receipt by the corporation of a certification complying with the procedure, the persons specified in the certification shall be deemed, for the purpose or purposes set forth in the certification, to be the holders of record of the number of shares specified in place of the shareholder making the certification.