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FOREIGN CORPORATIONS UNDER THE NEW KENTUCKY CORPORATION ACT

The 1972 General Assembly provided Kentucky with a new corporation law¹ which became effective July 1, 1972.² The foreign corporation provisions of the new law represent a significant improvement over previous statutory treatment of the foreign corporation.³ Under the old statute, the provisions were scattered, incomplete, and unattractive to expanding foreign corporations.⁴ The new law is designed to establish definite guidelines so that foreign corporations will know exactly what is required of them in order to lawfully transact business in the state of Kentucky.⁵ Because the new statute is patterned after the Model Business Corporation Act,⁶ experience with similar provisions in other jurisdictions gives Kentucky a head start on sometimes difficult interpretive judicial decisions.

For the first time under Kentucky law, the term "foreign corporations" has been specifically defined. KENTUCKY REVISED STATUTES ANNOTATED § 271A.010(2) [hereinafter cited as KRSA] provides that a foreign corporation is a "corporation for profit organized under the laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under this Act." Since there had been no statutory or judicial definition of the term, a foreign firm considering operations in Kentucky faced uncertainty regarding its status as a foreign corporation and the legal prerequisites for the transaction of business in Kentucky.

¹ KY. REV. STAT. ANN. ch. 271A. (Supp. 1972) [hereinafter cited as KRSA]. The new Kentucky Business Corporation Act is patterned after the ABA-ALI MODEL BUS. CORP. ACT (rev. ed. 1969).

² KY. ACTS ch. 274, § 166 (1972).

³ KY. REV. STAT. § 271.000 (1971) [hereinafter cited as KRS]. The old provisions for foreign corporations were KRS § 271.045, KRS § 271.055, KRS § 271.385, KRS § 271.545, KRS § 271.590, KRS § 271.610, and KRS § 271.990.

⁴ See Davidson, *The Bar Can Aid in Kentucky's Quest for New Business*, 31 KY. ST. B.J. 33 (April, 1967) [hereinafter cited as Davidson].

⁵ As of April 1, 1968, there were 4,356 foreign corporations authorized to transact business in Kentucky. KENTUCKY LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULL. NO. 76, CORPORATION LAW 14 (1969) [hereinafter cited as CORPORATION LAW]. By May 1, 1972, the number authorized had increased to more than 6,500. Interview with Thelma Stovall, Secretary of State, in Frankfort, Ky., May 16, 1972.

⁶ KENTUCKY LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULL. NO. 88, LEGISLATIVE HEARING: CORPORATION LAW 2 (1971) [hereinafter cited as LEGISLATIVE HEARING].

DOING BUSINESS

The power of the state to constitutionally control the activities of a foreign corporation within its borders has been substantially affirmed.⁷ The area of litigation has shifted from the state's right to control⁸ to the determination of what constitutes "doing business,"⁹ different degrees of activity being required for qualification purposes than for service of process or taxation. Recognizing that there has been confusion in this area, the Court of Appeals stated:

A foreign corporation's property may well be subject to taxation by a state and a foreign corporation may be amenable to the process of a state's courts for purposes of jurisdiction, yet it does not follow that a corporation engaged exclusively in interstate commerce may be subjected to state legislation requiring qualification in the state and imposing a penalty for failure to qualify.¹⁰

The new Kentucky Business Corporation Act requires a foreign corporation to procure a certificate of authority as a prerequisite to "transacting business" in the state.¹¹ For this reason, it is important to determine what extent of activity, whether labeled doing or transacting business, requires a corporation to qualify under the statute. The new act specifies ten activities, any of which a foreign corporation may carry on in the state and *not* be "transacting business" for qualification purposes:¹² (1) maintaining or defending any action or suit or effecting the settlement thereof, (2) holding directors or shareholders meetings, (3) maintaining bank accounts, (4) maintaining offices or agencies for the transfer, exchange, and registration of its securities, (5) effecting sales through independent contractors, (6) soliciting orders which require acceptance outside Kentucky before becoming binding contracts, (7) creating evidence of debts, mortgages, or liens on real or personal property, (8) securing or collectin

⁷ See *e.g.*, *Eli Lilly & Co. v. Sav-On-Drug, Inc.*, 366 U.S. 276 (1961); *Kentucky Straight Creek Coal Co. v. Commonwealth*, 200 S.W.2d 470 (Ky. 1947); *Security Benefit Ass'n v. Reising*, 14 S.W.2d 150 (Ky. 1929).

⁸ See Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 476 (1968) (advocating the federal legislation).

⁹ Roberts, *What Constitutes "Doing Business" by a Foreign Corporation in Kentucky*, 31 Ky. L.J. 1 (1942).

¹⁰ *Michigan Wisconsin Pipeline Co. v. Commonwealth*, 474 S.W.2d 873, 875 (Ky. 1972).

¹¹ KRSA § 271A.520(1). It should be noted that foreign corporations already authorized to transact business at the time this Act takes effect are seemingly not required to procure a certificate of authority but are still entitled to all the rights and privileges and subject to all the limitations, restrictions, liabilities, and duties applicable to foreign corporations that have procured such certificates. See KRSA § 271A.605.

¹² KRSA § 271A.520(2). This provision is identical to ABA-ALI MODEL BUS. CORP. ACT § 106 (rev. ed. 1969).

debts, (9) transacting any business in interstate commerce, and (10) conducting an isolated transaction of less than 30 days' duration. The act also expressly provides that there may be other activities not enumerated that fall short of transacting business for qualification purposes. It should be kept in mind that activities which constitute doing business for service of process or taxation purposes are often insufficient to constitute doing business for the purpose of qualification, and, therefore, cases which relate to the former should not be confused with qualification cases.¹³

Previous Kentucky case law defining "doing business" may or may not be relevant in particular cases when defining "transacting business" under the new act. Buying timber by a foreign corporation under a written contract in an isolated transaction in Kentucky has been held to be doing business,¹⁴ while collection of a debt by a foreign corporation from a resident in Kentucky, and taking a mortgage to secure it, was not.¹⁵ A meat packing firm, soliciting orders in Kentucky which were filled in Ohio and then shipped into Kentucky, was found not to be doing business.¹⁶ The Court of Appeals, in its most recent decision in this area,¹⁷ looked at the nature of the operation and the activities in which the corporation was involved, rather than at its capital, stock, or machinery located in the state. The issue before the Court was whether the purchase of property interests for an interstate gas line right of way was (1) separable and independent from or (2) incidental to interstate commerce. The Court held that the mere organization of this real property interest for the sole purpose of affecting the flow of interstate commerce was not a separable and independent transaction sufficiently removed from interstate commerce to permit a finding that the corporation was "doing business" in Kentucky for purposes of qualification.

CERTIFICATE OF AUTHORITY

The 1972 law employs a new concept to allow a foreign corporation to transact business in Kentucky, the certificate of authority. Previously, KRS § 271.055 required only that a certified copy of the articles of incorporation be filed with the Secretary of State. Compliance with this requirement resulted in Kentucky's implied consent for a corporation to do business in the state. The certificate

¹³ MODEL BUS. CORP. ACT ANN. 2D § 106 ¶ 2 (1971).

¹⁴ E.C. Artman Lumber Co. v. Bogard, 230 S.W. 953 (Ky. 1921).

¹⁵ Ichenhauser Co. v. Landrum's Assignee, 155 S.W. 738, 740 (Ky. 1913).

¹⁶ City of Winchester v. Lohrey Packing Co., 237 S.W.2d 868 (Ky. 1951).

¹⁷ Michigan Wisconsin Pipeline Co. v. Commonwealth, 474 S.W.2d 873 (Ky. 1972).

of authority concept is designed to protect the state's citizens while permitting supervision of the foreign corporation. It places the foreign and domestic corporation on an equal legal basis, provides easy access to evidence of corporate existence, and subjects the foreign corporation more readily to state court jurisdiction.¹⁸

The foreign corporation may procure a certificate of authority by making application to the Secretary of State in duplicate, setting forth the corporate name, the state or country in which it is incorporated, the date of incorporation, the duration of the corporation, the address of its principal office in the domiciliary state, the resident registered agent and registered office in Kentucky, the purpose for which the corporation is organized, and the name and address of its corporate directors and officers.¹⁹ Kentucky, unlike the Model Act,²⁰ does *not* require that the application contain the number of shares of stock in each class, the amount of the corporation's stated capital, or the estimated value of the corporation's property.

After duplicate originals of the application for the certificate of authority are delivered to the Secretary of State, *together* with a copy of the articles of incorporation, the Secretary of State will (if the application contains the information required by law) file one copy in his office and mail the other back to the corporation with the certificate of authority.²¹ When the Secretary of State has issued the certificate, the corporation is authorized to transact business in Kentucky for the purpose set forth in its application, subject to the state's right to suspend or revoke such authority for failure to conform to the act.²²

There is also a statutory provision granting a qualified foreign corporation all of the rights and privileges which would be enjoyed by a domestic corporation organized for the purpose set forth in the foreign corporation's application for the certificate of authority.²³ The foreign corporation does not automatically carry with it into Kentucky the powers granted to it by its domiciliary state. Consequently, this provision operates to restrict the qualified foreign corporation to rights and privileges *no greater than* those of domestic corporations organized for the same purposes.²⁴

As mentioned above, the foreign corporation is required in its

¹⁸ MODEL BUS. CORP. ACT ANN. 2D § 110 ¶ 2 (1971).

¹⁹ KRSA § 271A.540.

²⁰ MODEL BUS. CORP. ACT ANN. 2D § 110 ¶ 1 (1971).

²¹ KRSA § 271A.545.

²² KRSA § 271A.550.

²³ KRSA § 271A.525.

²⁴ MODEL BUS. CORP. ACT ANN. 2D § 107 ¶ 2 (1971).

application for the certificate of authority to state the purpose for which it intends to transact business. The new act allows a domestic corporation to organize for any legitimate purpose,²⁵ and presumably the same would be true for a foreign corporation. Although the purpose set forth in the certificate of authority must be permissible under the foreign corporation's articles, it may be less comprehensive.²⁶ It would, however, be wise to include as broad a purpose as that contained in the articles of incorporation in order to permit future expansion within Kentucky without unnecessary amendments.²⁷

NAME

KRSA § 271A.530 states that no certificate of authority will be issued unless one of four identifying words is used in the corporate name—"corporation," "company," "incorporated," or "limited." The purpose of this requirement is to alert the public that the entity is a corporation with limited liability. Another requirement is that the name cannot imply a purpose not contained in the articles of incorporation.²⁸ Furthermore, this section prohibits the use of a name that is the same as or deceptively similar to a name presently reserved or in use. This statutory mandate is qualified in three situations: (1) when the corporation with greater priority grants written permission and one or more new words are added to the name to prevent further deception, (2) when a court of appropriate jurisdiction grants the corporation the right to use the name, or (3) when a fictitious name for transacting business in Kentucky is adopted by a resolution of the board of directors of the corporation entering Kentucky with its name already in use.²⁹ This provision is designed to eliminate the general public confusion between different corporate bodies with identical names.³⁰ It also protects from unfair competition the domestic or foreign corporations which have reserved or registered names.³¹

If a qualified corporation later attempts to change its name, it must choose a name that would have been acceptable in its original application for the certificate of authority.³² Any scheme to intention-

²⁵ KRSA § 271A.015(2).

²⁶ LEGISLATIVE HEARING, *supra* note 6, at 90.

²⁷ Davidson, *supra* note 7, at 34.

²⁸ KRSA § 271A.530(2).

²⁹ KRSA § 271A.530(3).

³⁰ MODEL BUS. CORP. ACT ANN. 2D § 108 ¶ 2 (1971).

³¹ For illustrations of how Kentucky approached the problem of deceptively similar names under the old statute, *see* Covington Inn Corp. v. White Horse Tavern, Inc., 445 S.W.2d 135 (Ky. 1969); Burnside Veneer Corp. v. New Burnside Veneer Corp., 247 S.W.2d 524 (Ky. 1952).

³² KRSA § 271A.535.

ally change an acceptable name to an unacceptable one results in automatic suspension of the certificate of authority and the right to transact business in Kentucky.³³ The suspension is effective until an amended certificate of authority is issued by the Secretary of State.

Under the new act, any foreign corporation which intends to apply for a certificate of authority in Kentucky can reserve a corporate name for a period of 120 days upon payment of a \$10 fee to the Secretary of State.³⁴ This provision protects the corporation in the period between selection of the corporate name and application for the certificate of authority. The foreign corporation may register its name by filing with the Secretary of State a registration application containing the name and a statement that it is carrying on business and is in good standing in its domiciliary state.³⁵ The registration is effective until the end of the calendar year in which it is filed, and a fee of only \$1 per month is charged. The registered name is advantageous because it can be "protected" for up to a year, or three times as long as a reserved name, and it involves no time lapse, as in renewal of the reserved name.

REGISTERED OFFICE AND AGENT

The Kentucky Business Corporation Act requires all foreign corporations to maintain a registered office and a registered agent in this state.³⁶ An individual resident of Kentucky, or a domestic corporation, or a qualified foreign corporation may serve as the registered agent. The registered agent's business office must be designated as the registered office;³⁷ however, the registered office does not have to be located at the foreign corporation's place of business.³⁸

³³ MODEL BUS. CORP. ACT ANN. 2D § 109 ¶ 2 (1971).

³⁴ KRSA § 271A.045.

³⁵ KRSA § 271A.050.

³⁶ KRSA § 271A.555.

³⁷ MODEL BUS. CORP. ACT ANN. 2D § 113 ¶ 2 (1971).

³⁸ There is a possibility that this statute is in direct conflict with Section 194 of the Kentucky Constitution:

All corporations formed under the laws of this state, or carrying on business in this state, shall, at all times, have one or more known places of business in this state, and an authorized agent or agents *there*, upon whom process may be executed, and the general assembly shall enact laws to carry into effect the provisions of this section (emphasis added).

"There" is subject to both a broad and a narrow interpretation. The broad interpretation would only require the foreign corporation to maintain an authorized agent in the state, not necessarily at its place of business. The narrow interpretation would require the foreign corporation to maintain the registered office at its place of business within the state.

The foreign corporation is permitted to change its registered office or agent upon the filing of a statement with the Secretary of State setting forth the changes to be made and reciting that the changes were authorized by the corporation's board of directors.³⁹ Many foreign corporations are represented for service of process by corporation service companies.⁴⁰ Usually the service companies have numerous foreign corporations as "clients." Requiring every foreign corporation which the service company represents to file a change of its registered office application whenever the service company moves would entail unnecessary time and paperwork. Kentucky avoids this by allowing the registered agent (service company) to change its business and the address of the registered office of the foreign corporation it represents by filing a statement setting forth the changes.⁴¹ The statement must also recite that a copy has been mailed to all the corporations the service company represents. In the event of resignation of a foreign corporation's agent, written notice, which becomes effective 30 days after receipt, must be filed with the Secretary of State.⁴²

The registered agent who has been appointed by the foreign corporation is deemed an agent of the corporation, and process or notice may be served on him.⁴³ As under prior law,⁴⁴ the Secretary of State is the designated agent for a foreign corporation failing to maintain its own agent, and service on the corporation is deemed to be effective the tenth day after the Secretary is served.⁴⁵ This provision prevents foreign corporations from escaping Kentucky's jurisdiction after transacting business in Kentucky or committing wrongs against the state's citizens merely by failure to have an agent in the state. The injured Kentucky citizen is thereby saved the necessity of going to the foreign corporation's domiciliary state to bring suit.⁴⁶

AMENDMENTS

KRSA § 271A.570 provides that the foreign corporation must file with the Secretary of State a certified copy of any amendments to its articles of incorporation within 60 days of the effective date

³⁹ KRSA § 271A.560.

⁴⁰ Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C.L. REV. 733, 735 (1969).

⁴¹ KRSA § 271A.560(4). These requirements are identical to those for domestic corporations in KRSA § 271A.060 and § 271A.065.

⁴² KRSA § 271A.560(3).

⁴³ KRSA § 271A.565(1).

⁴⁴ KRS § 271.610(2).

⁴⁵ KRSA § 271A.565(2).

⁴⁶ MODEL BUS. CORP. ACT ANN. 2D § 115 ¶ 2 (1971).

thereof.⁴⁷ Although the amendments can not affect the corporate name or purpose contained in the certificate of authority, any other legitimate change is permissible. To alter the name or purpose, an amended certificate of authority must be filed which conforms to the prerequisites of the original application.⁴⁸

MERGER

KRSA § 271A.385 permits the merger of a foreign and domestic corporation.⁴⁹ If the surviving corporation is the foreign corporation, it must file an authenticated copy of the articles of merger with the Secretary of State within 60 days.⁵⁰ Furthermore, the surviving corporation must procure a certificate of authority to transact business in Kentucky, if it has not previously qualified.⁵¹ This latter provision was not intended to apply to consolidations since a consolidation results in a new corporation and the drafters of the Model Act thought the new corporation should be required to secure a certificate of authority.⁵²

There is some uncertainty as to the constitutionality of KRSA § 271A.385(b)(4), since a merger between a foreign and domestic corporation is prohibited under the Kentucky Constitution if the surviving entity is the foreign corporation.⁵³ In an attempt to meet the spirit of this constitutional mandate without unduly restricting mergers, the General Assembly enacted a provision in 1970 which permitted the foreign corporation to be the surviving corporation, provided it filed with the Secretary of State an agreement consenting to the retention of jurisdiction by Kentucky over all corporate property within the state at the time of the merger.⁵⁴ Although this provision is incorporated in the new act,⁵⁵ the constitutional prohibition may remain a deterrent to mergers until the statute has been subjected to scrutiny by the courts.

WITHDRAWAL

The new law differs substantially from the Model Act in the

⁴⁷ This is 30 days longer than provided for in ABA-ALI MODEL BUS. CORP. ACT § 116 (rev. ed. 1969).

⁴⁸ KRSA § 271A.580.

⁴⁹ Prior to 1970 when KRS § 271.468 was adopted, a Kentucky corporation was prohibited from merging if the surviving corporation was not a Kentucky corporation.

⁵⁰ KRSA § 271A.575.

⁵¹ *Id.*

⁵² MODEL BUS. CORP. ACT ANN. 2D § 117 ¶ 2 (1971).

⁵³ KY. CONST. § 200.

⁵⁴ KRS § 271.468(3)(d).

⁵⁵ KRSA § 271A.385(b)(4).

withdrawal area. KRSA § 271A.585(1) provides that the foreign corporation may withdraw from transacting business in the state after procuring a certificate of withdrawal from the Secretary of State. The application for withdrawal must include (1) the name of the corporation and the state or country under which it is incorporated and (2) statements that the corporation is not transacting business in Kentucky, that it surrenders the authority to transact business in Kentucky, that it revokes its registered agent's authority to accept service of process, and that it gives express consent to the Secretary of State to serve as the agent's replacement for any cause of action arising while the corporation was authorized to do business in Kentucky.⁵⁶ The Kentucky Act, unlike the Model Act, contains no requirements for listing the number of authorized or issued shares and their par value or the amount of stated capital.⁵⁷

Triplicate originals of the application for withdrawal must be executed by the president and the secretary of the corporation, verified by one of them, and delivered to the Secretary of State. The Secretary of State will not grant withdrawal if there is a tax liability reported by the Commissioner of Revenue.⁵⁸ If there is no tax liability, the Secretary will mark "filed" on the application and issue the certificate of withdrawal to the corporation, thereby rendering the withdrawal effective.⁵⁹

REVOCATION

The Secretary of State may revoke the certificate of authority if the corporation fails to comply with certain requirements, such as filing the annual report or appointing and maintaining a registered agent in Kentucky.⁶⁰ The foreign corporation must be given 60 days' notice by mail at its registered Kentucky office so that it may have an opportunity to comply before the certificate of revocation is issued. The corporation's authority to transact business in Kentucky is terminated as of the date of issuance of the certificate of revocation.⁶¹

PENALTIES

KRSA § 271A.610 declares that a contract entered into by a non-qualified foreign corporation is not void, but may be enforced

⁵⁶ KRSA § 271A.585(1).

⁵⁷ MODEL BUS. CORP. ACT ANN. 2D § 119 ¶ 1 (1971).

⁵⁸ KRSA § 271A.590.

⁵⁹ KRSA § 271A.590(3).

⁶⁰ KRSA § 271A.595.

⁶¹ KRSA § 271A.600.

by suit initiated after the corporation qualifies.⁶² If the suit was instituted before qualification, the foreign corporation may qualify and continue the litigation without refileing.⁶³ This provision becomes particularly significant when a statute of limitation is applicable. Contrary to the Model Act,⁶⁴ KRSA § 271A.610(2) prohibits a non-qualified foreign corporation from instituting suit until a forfeiture of \$250 is paid. Furthermore, certificates must be presented showing that all liabilities due under the act have been paid and that according to the Commissioner of Revenue all tax liabilities owed the Commonwealth have been satisfied. Kentucky has also retained the penal provisions contained in the old statute;⁶⁵ any foreign corporation that fails to comply with the provisions of the act, or any director, officer, or agent who is responsible for or knowingly participates in such a violation is subject to a fine of not less than \$100 nor more than \$1,000. Since the application fee for obtaining a certificate of authority is only \$35, these penalties should encourage qualification.

ANNUAL REPORTS

Foreign corporations are required to file annual reports containing the name of the corporation, the state of domicile, the address of the Kentucky registered office and name of the registered agent there, and the address of the principal office in the domiciliary state.⁶⁶ The length of time for filing the annual report under the Model Act has been extended in the Kentucky Act from two to six months. The deadline for the report is June 30th of each year, except that no report is required in the year the certificate of authority is initially issued. The foreign corporation has the burden of proving that the report was mailed to the Secretary of State, and such mailing is deemed compliance. An incomplete or unacceptable report must be resubmitted.

LIMITATIONS

Kentucky's new corporation statute has removed many impediments to corporate development by setting forth definitive guidelines.

⁶² See *Farmers Mut. Hail Ins. Co. v. Gorsuch*, 110 N.E.2d 344 (Ind. 1953), which held that the failure of a foreign corporation doing business in Indiana to obtain authorization to do business did not render the contract void but rather kept the matter in abeyance until the company complied with the authorization procedure.

⁶³ MODEL BUS. CORP. ACT ANN. 2d § 123 ¶ 2 (1971); *Inn Operations, Inc. v. River Hills Motor Inn Co.*, 152 N.W.2d 808 (Iowa 1967).

⁶⁴ ABA-ALI MODEL BUS. CORP. ACT § 124 (rev. ed. 1969).

⁶⁵ KRSA § 271A.640. See *Commonwealth ex rel. Breckinridge v. Monroe Co.*, 378 S.W.2d 809 (Ky. 1964).

⁶⁶ KRSA § 271A.615.

However, the new statute has retained the escheat provision,⁶⁷ as required by § 192 of the Kentucky Constitution, which states that except where it "may be proper and necessary for legitimate business," no foreign or domestic corporation may hold real estate for longer than five years. The purpose of the constitutional provision, which was adopted in 1891, was to prevent property from being held by parties who could not be served and to limit monopolistic control of Kentucky land by the concentrated wealth of corporations.⁶⁸ Escheat proceedings may not be instituted until the Attorney General or the Department of Revenue has given written notice to the offending corporation that it has two years to dispose of the property. Fortunately for Kentucky corporations, the Court of Appeals has *denied* the state the power to escheat when there was reasonable certainty that property was being held for future use in the corporation's legitimate business. In *Great-West Life Assurance Co. v. Courier-Journal Job Printing Co.*,⁶⁹ the Court held that an insurance company could invest its reserve funds in and hold Kentucky real estate which was to be leased to another company for industrial and commercial purposes. Furthermore, the escheat provision is not actively enforced.⁷⁰

CONCLUSION

The Kentucky Business Corporation Act attempts to give foreign corporations definite guidelines for doing business in Kentucky. The act is explicit regarding the contents of the certificate of authority and the certificate of withdrawal, the status of the corporate name, the revocation procedure, and the penalty provisions. It is a distinct improvement over previous law, which was incomplete and gave no assurance to the foreign corporation that it had satisfied all requirements for the lawful transaction of business in Kentucky.

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⁶⁷ KRSA § 271A.705; KY. CONST. § 192.

⁶⁸ *Great-West Life Assurance Co. v. Courier-Journal Job Printing Co.*, 288 S.W.2d 639, 641 (Ky. 1956).

⁶⁹ *Id.*

⁷⁰ CORPORATION LAW, *supra* note 5, at 3.