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THE 1967 AMENDMENTS TO THE INDIANA GENERAL CORPORATION ACT
RICHARD E. DEER† and DOUGLAS F. BURNS††

The 1967 Indiana General Assembly enacted a major revision of the Indiana General Corporation Act in Senate Bill No. 255. Most of the important operative sections of the act were amended and several new provisions were added by this bill. This is the most comprehensive revision of the Indiana Act since its adoption in 1929 and the first general revision undertaken since 1949.

The purpose of this article is to explain the amendments made and the resulting changes in corporate practice in Indiana. The sources of the new provisions and the reason for their inclusion in the Indiana Act will also be discussed.

I. HISTORY OF THE INDIANA ACT

The statute, which was adopted in 1929 as the Indiana General Corporation Act, was, to a large extent, one of the forerunners of the American Bar Association's Model Business Corporations Act. Indiana's statute was one of the models for the ABA's proposed federal corporation law on which the Model Act, first issued in 1946, was based. The Model Act, in turn, has served as the principal source of corporate law provisions for those states which have amended or substantially rewritten their laws since 1946.²

Prior to 1967, no thorough revision of the 1929 Act had been attempted in Indiana. The Indiana Act, which in 1929 had been among the most modern of general corporation laws and has served indirectly as the basis for major revisions in more than one half of the states,² was seriously outdated. A systematic examination and revision, in light of the concepts which had become generally accepted in other states, was needed.

The preparation and drafting of the 1967 amendments occupied a relatively short period of time. On January 10, 1967, the Indiana Corporations Survey Commission requested the authors of the present article to draft a bill for the consideration of the General Assembly. The Act became effective on September 1, 1967.

†, †† Members, Indiana Bar.
1. ABA-ALI the Drafting of Corporate Charters and By-Laws 2 (1951).
2. AMERICAN BAR FOUNDATION, 1 MODEL BUS. CORP. ACT. ANN., § 1.
4.01 (1960).
II. The Amendments

The 1967 Act amended thirty eight existing sections of the Indiana General Corporation Act, added seven new sections, and repealed two existing sections. Some of the changes were minor changes in terminology. The intended effect of the amendments is threefold: first, to make the act more readily understandable to persons operating under it by defining or redefining certain terms; second, to fill gaps in Indiana corporate law by inserting provisions covering transactions with respect to which the law has heretofore been completely silent; and third, to eliminate certain formal requirements of the law which have served to complicate corporate procedure in Indiana without conferring any corresponding protection on persons dealing with Indiana corporations.

A. Terminology

Section 1 of the Indiana Act was amended by the addition of eight new definitions and the elimination of two existing definitions. The language of the new definitions was taken entirely from section 2 of the Model Act. The intended effect of the changes is to introduce a correlation between Indiana statutory law and accounting terminology in use throughout the country. The new terminology affects principally the right of a corporation to acquire its own shares and to declare dividends although it affects numerous other sections of the act. These changes should simplify the responsibilities of accountants and lawyers who are called upon to certify compliance by Indiana corporations with the various sections of the Indiana statute.

1. Shares

a. Authorized Shares New section 1(g) substitutes the relatively simple Model Act definition of "authorized shares" for the previous definition of "capital stock." The former definition was a meaningless exercise, purporting to define "capital stock" as the sum of the aggregate par value of shares having par value and the number of shares having no par value. The term "capital stock" has been eliminated from the act in favor of the terms "authorized shares" or "shares" as appropriate.
b. Treasury Shares New section 1(n) replaces the old definition of "treasury stock" with the Model Act definition of "treasury shares." The term "stock" is no longer used in the act. The new definition of treasury shares reflects the change made by amended sections 30 and 30a of the Act. Prior to the 1967 amendments, it was not possible under Indiana law to restore common shares to the status of authorized but unissued without going through the cumbersome process of cancelling the shares and reauthorizing their issuance.

2. Accounting Terminology

The 1967 amendments add definitions of five accounting terms to provide guidance in ascertaining the legal consequences of financial transactions. The scheme is that of the Model Act and is relatively simple but extremely important for a corporation engaged in routine business transactions involving financing, offerings of securities, and sales of assets. A corporation's net assets [section 1 (o)] are divided into stated capital [section 1(h)] and surplus [section 1(p)]; surplus is in turn divided into earned surplus [section 1(q)] and capital surplus [section 1(r)].

a. Net Assets Section 1(o) defines "net assets" as the amount by which the total assets of a corporation, excluding treasury shares, exceed the total debts of the corporation. This rather obvious definition is in line with current accounting practice. Prior to the 1967 amendments, this term was not defined in the act.

b. Stated Capital New section 1(h) replaces the former definition of "capital" which was felt to be inadequate in two important respects. First, the former definition did not expressly recognize the power of the directors to allocate a portion of the consideration received for the issue of shares without par value to surplus. This power is now explicitly conferred upon the directors by new section 12a. Second, the former definition did not contemplate any reduction of capital of the corporation; this is now authorized by new section 30b.

10. IND. ANN. STAT. § 25-101(n) (Burns 1960 Repl.).
11. MODEL ACT § 2(h).
13. See text accompanying note 66 infra.
The former definition of capital included a definition of the term "surplus paid in cash" which, prior to the 1967 amendments, was a permissible source for dividend. The dividend section has been substantially rewritten and this term has been discarded.

c. **Surplus** New section 1(p) defines "surplus" as the excess of net assets over stated capital. The term surplus was not defined prior to the 1967 amendments.

d. **Earned Surplus** The new definition of earned surplus contained in section 1(q) of the act is Model Act section 2(1). This rather involved definition contemplates that the balance sheet of the corporation will show as earned surplus the current balance of undistributed net income of the corporation from the time of its organization. The definition, however, also contemplates that earned surplus may be transferred to capital surplus and to stated capital, that capital surplus may be transferred to stated capital or to earned surplus, and that the amount of earned surplus would be affected by such transfers. Earned surplus would not include any contributions to capital or consideration for the issuance of stock in excess of amounts allocated to stated capital.

e. **Capital Surplus** New Section 1(r) defines capital surplus as the residual surplus remaining after the deduction of amounts falling within the definition of earned surplus.

3. **Insolvent** Prior to the 1967 amendments, the Indiana Act contained no definition of the important word "insolvent," although this term is used in various sections of the act. New section 1(s) adopts the definition of Model Act section 2(n). The new definition makes it clear that a corporation is to be considered insolvent only when it is unable to pay its debts as they become due in the ordinary course of business.

24. Burns § 25-211a expressly grants to the directors the power to transfer earned surplus and capital surplus to stated capital by resolution. Stated capital may be reduced under the provisions of Burns § 25-229b, as noted above, and the surplus thereby resulting would be capital surplus, since it would not come within the phrase "net profits, income, gains and losses." Section 64 of the Model Act, giving the directors the power to transfer earned surplus to capital surplus and to transfer capital surplus to earned surplus, has not been adopted in Indiana. Since, however, the Indiana Act does not forbid such transfers, and appears to contemplate their possibility in this definitional section, it would seem that such power could be conferred upon the board of directors in the articles of incorporation.
B. Formation of the Corporation

For attorneys in corporate practice, some of the most significant changes in corporate law made by the 1967 amendments deal with the formal process of organizing the corporation. This procedure has been greatly simplified and will have the result of eliminating a large amount of needless paper work.

1. Reservation of Corporate Name Prior to the adoption of the 1967 amendments, persons intending to form a domestic corporation have had the right to reserve a corporate name with the Office of the Secretary of State for a period of thirty days. Section 4(c) of the 1967 amendments extends this privilege to a domestic corporation intending to change its name, a foreign corporation intending to make application to do business in Indiana, a foreign corporation already qualified which desires to change its name, and persons intending to organize a foreign corporation and intending to qualify it to do business in Indiana. This change is desirable since no valid reason exists for denying this privilege to persons other than those intending to form a domestic corporation; under section 8 of the Model Act, all the persons above described have the right to reserve a corporate name. There remains no provision in Indiana law permitting persons intending to form a not-for-profit corporation to reserve a name.

2. Organization Procedure Under Indiana law prior to the 1967 amendments, a person desiring to form a corporation was first required to cause “lists” for subscriptions to the shares of the corporation to be opened; when subscriptions in the amount of at least 1,000 dollars had been obtained, the persons causing the “lists” to be opened were then required to call a meeting of the subscribers for the purpose of designating the incorporators and electing the first board of directors. The incorporators then executed articles of incorporation and caused them to be filed and recorded. When the initial amount of capital had been paid to the corporation, a majority of the directors were required to file an affidavit to that effect with the appropriate county recorder.

In practice, the incorporation process frequently takes place in the office of an attorney; the formal requirements, such as opening lists and taking initial subscriptions, were useless formalities. The essential feature of the incorporating process under the 1967 amend-

ments is the filing of articles of incorporation with the Secretary of State; when the articles, signed by the incorporators, are filed, the Secretary issues his certificate and the corporate existence begins. The recording requirement of prior law has been retained for the present.

a. Incorporators Under prior law, only three or more natural persons, a majority of whom were required to be citizens of the United States, could form a corporation. Section 14 of the act provides that one or more persons, or a domestic or foreign corporation, may act as incorporator. This provision is taken from section 47 of the Model Act, as amended in 1964. Since the only statutory function of the incorporator is to sign the articles of incorporation and since the initial board of directors of the corporation is named in the articles of incorporation [section 17(10)], there would appear to be no valid reason for the continued requirement of three incorporators. This is a matter which has persisted more through tradition than because of any overriding policy consideration.

b. Initial Subscriptions The 1967 amendments repeal the section of former law requiring the incorporators to take initial subscriptions for the shares of the corporation to be formed. Many persons forming corporations under the Indiana Act will desire to secure subscriptions for the shares of the corporation prior to its formation. This, of course, may still be done and the rights and obligations of subscribers are set forth in section 6(d) of the act. The repeal of section 15 of the original act merely eliminates the need for formal subscriptions and permits subscriptions to be received after incorporation as well as before.

c. Meeting of Subscribers The 1967 amendments also repeal section 16 of the 1929 Act requiring a meeting of the subscribers prior to incorporation. Since no subscribers are necessary, it would be anomalous to require that they meet. Under prior law, the subscribers were required to perform two acts prior to incorporation: first, they were to elect the incorporators and, second, they were to elect the directors. The election of the incorporators is unnecessary and in most cases the initial board of directors may be chosen informally by the persons organizing the corporation without the necessity of a formal

33. Id.
34. Burns § 25-216. Under Burns § 25-241 the incorporator or incorporators may voluntarily dissolve the corporation by surrendering the certificate of incorporation prior to the issuance of shares.
35. Burns § 25-216(10).
36. IND. ANN. STAT. § 25-214 (Burns 1960 Repl.).
37. Burns § 25-205(d).
38. IND. ANN. STAT. § 25-215 (Burns 1960 Repl.).
meeting. The Indiana Act now follows the Model Act in permitting the first board of directors to be designated by the incorporators.39

d. Articles of Incorporation The only substantive change imported into the Indiana Act by the 1967 amendments with respect to the mandatory content of the articles of incorporation appears in section 17(8).40 The incorporator is no longer required to state the amount of paid-in capital with which the corporation shall begin business but need only state that the corporation will not begin business until at least 1,000 dollars has been received. If it is desired to specify a larger amount, this may be done. Former law permitted a corporation to begin business after only 500 dollars had been received.41 The amendment basically follows the scheme of section 48(g) of the Model Act.42

e. Paid-In Capital The amended act does away with the requirement of filing an affidavit of paid-in capital with the appropriate county recorder. Section 20 of the act as amended43 substitutes a requirement that a corporation before commencing business must have received a consideration of at least 1,000 dollars (or if a larger amount is specified in the articles of incorporation as the initial stated capital of the corporation, at least such amount). It is difficult to see what protection was provided by the former recording requirement; it has been repealed in the interest of eliminating formalities.

C. Shares and Capital

1. Subscriptions Section 6(d)44 has been amended in three particulars. The first phrase of this section recognizes that provisions in a pre-incorporation subscription agreement will be given effect. Second, it is now recognized that subscriptions may be obtained by a corporation after incorporation, with the same effect as if they had been obtained prior thereto. Third, the amendment requires that any call made by the board of directors for payment on subscriptions must be uniform as to all shares of the same class or series.

2. Share Certificates Two minor changes are made in the law governing the issuance and transfer of certificates for shares. Section

40. Burns § 25-216(8).
42. The requirement in the last paragraph of section 17 that articles be acknowledged by at least three incorporators is anachronistic. Where a corporation is incorporated by one or two persons, each of their signatures should be acknowledged but there should be no question that less than three may incorporate under the law as amended.
44. Burns § 25-205(d).
6(f) of the act\textsuperscript{45} is amended to make it clear that the signature on the certificate of an officer who had ceased to be such at the time the certificate is issued does not alter the rights of the holder. This provision is taken from section 21 of the Model Act. Section 6(g)\textsuperscript{46} is amended to eliminate the reference to the \textit{Uniform Stock Transfer Act} in favor of a reference to the \textit{Uniform Commercial Code}; this necessary change was overlooked at the time the Code was adopted.

3. \textit{Shareholders' Rights} Section 11 of the act\textsuperscript{47} was amended by adding a provision requiring a corporation to mail its most recent annual financial statements to any shareholder on request. This provision is taken from section 46 of the Model Act.\textsuperscript{48}

4. \textit{Accounting For Issuance of Shares} Section 12a of the act as amended\textsuperscript{49} is practically a complete new section derived from section 19 of the Model Act. This section formulates rules for the determination of the stated capital of the corporation and empowers the directors to allocate consideration received from the sale of shares between stated capital and capital surplus and to transfer amounts from surplus to stated capital. Although most of this material is new to the statute, it follows accepted accounting rules and thus will not entail any major change in Indiana corporate practice.

Consideration for the issuance of shares having a par value is allocated to stated capital up to the par value of the shares. In the case of shares without par value, the board of directors may allocate all or any part of the amount received to stated capital, with the remainder being assigned to capital surplus. In the case of shares issued in connection with a merger or consolidation, it is provided that amounts may be allocated to earned surplus or capital surplus to the extent of the aggregate earned surplus of the merging or consolidating corporations. This recognizes the fact that earned surplus is combined by accountants under the pooling of interest theory.

Since Indiana law provides that, if the articles of incorporation so provide, a corporation may issue par value shares for a consideration less than their par value,\textsuperscript{50} it was deemed advisable to provide that, in the event shares are issued in this manner, the corporation would be required to transfer from surplus to stated capital the difference

\textsuperscript{45} Burns § 25-205(f).
\textsuperscript{46} Burns § 25-205(g).
\textsuperscript{47} Burns § 25-210.
\textsuperscript{48} The word "annual" in section 11 of the Indiana Act was added to make it clear that a corporation has no obligation to disseminate weekly or monthly operating statements.
\textsuperscript{49} Burns § 25-211a.
\textsuperscript{50} \textit{Ind. Ann. Stat.} § 25-205(c) (Burns 1960 Repl.).
between the aggregate par value of the shares and the amount of consideration received from their issuance.

Section 6(c) of the act has been amended to specify the accounting treatment where shares in the corporation are exchanged for shares of a different type or are converted into shares of a different type. This provision is based upon section 17 of the Model Act. D. Management

1. Shareholders The 1967 amendments make three changes with respect to the powers of shareholders. Section 8(f) is a new provision and is identical with section 136 of the Model Act. This section expressly permits the articles of incorporation of a corporation to contain a more stringent voting requirement than the minimum set by the act with respect to any action to be taken by the shareholders. Thus, a provision in the articles of a closely held corporation requiring a two-thirds shareholder approval for any action to be taken by the corporation would be valid.

Section 8(i) is likewise entirely new and is based on Model Act section 138. This section permits the shareholders of a corporation to act, upon unanimous written consent, without a meeting.

Section 9a of the act is entirely new and is based on Model Act optional section 36A. This section permits the shareholders to remove directors with or without cause at any meeting called expressly for that purpose. The section as written provides safeguards for directors elected under a cumulative voting system and those elected by particular classes of shareholders.

2. Directors Section 8(b) changes the method for fixing the number of directors of a corporation. Under prior law it was necessary for the articles of incorporation to specify either (1) the exact number of directors for (2) the maximum number of directors, together with the number to be chosen in the event the by-laws failed to fix an exact number. The articles were also required to contain a provision authorizing the by-laws to fix a number not less than three nor more than the maximum fixed in the articles.

51. Burns § 25-205(c).
52. The words "and whether or not any additional consideration is paid to the corporation in connection with such exchange" does not appear in the Model Act section.
54. Burns § 25-207(i).
56. Burns § 25-208(b).
57. IND. ANN. STAT. § 25-208 (Burns 1960 Repl.).
The amendment eliminates this rather cumbersome requirement and provides that the number of directors shall be fixed by the by-laws at any number not less than three and that the articles need fix only the number of directors constituting the initial board.

As it was before the 1967 act, the by-laws may be amended to increase or decrease the number of directors; however, it is now provided that no decrease shall have the effect of shortening the term of any incumbent director. Under prior law, a decrease went into effect at the next annual meeting of the shareholders—this could have the effect of shortening the term of an incumbent director elected for a term of more than one year, while it would not permit the board to reduce the number of directors prior to the next annual meeting, even if, by reason of death or resignation, there was no longer a full board.

Section 9(i) permitting the directors to act by unanimous written consent without a meeting was amended to eliminate the requirement that, before the directors could so act, the articles of incorporation must contain an explicit provision permitting this. In line with section 39A of the Model Act, the Indiana Act now provides that the directors will have this power unless the articles of incorporation explicitly deny it.

Section 8a was added to establish a procedure for fixing the record date for the payment of a dividend and for other purposes for which it may be desirable to establish a record date or to close the stock transfer books. This provision is based upon section 28 of the Model Act. Section 8(e) of the act establishes the procedure for fixing a record date for voting at meetings of shareholders.

Section 10 of the act has been amended to prescribe the procedure for the removal of corporate officers by the board of directors. This is section 45 of the Model Act.

3. Executive Committee Section 9(g), which provides for the establishment of an executive committee, has been amended in light of section 38 of the Model Act. Under this provision, as amended, the power to appoint an executive committee or other committees with power to exercise the authority of the board of directors may be denied in the articles of incorporation. It is now clear that a corporation may designate more than one committee with such powers as the board may give it in the resolution creating it. The amended section,

58. Burns § 25-208(i).
60. Burns § 25-207(e).
62. Burns § 25-208(g).
however, enumerates certain transactions which may not be approved merely by an executive committee. These include amending the articles of incorporation, adopting an agreement of merger or consolidation, selling all or substantially all of the assets of the corporation, recommending voluntary dissolution, and amending the by-laws.

E. Powers

1. General Powers Section 3 of the act, setting forth the general powers of corporations incorporated under the Indiana Act, was amended in three respects. Section 3(b)(5), relating to the borrowing power of corporations, was expanded by the substitution of the wording of Model Act section 4(h). The principal change made by this amendment is to make clear the power of a corporation to make guarantees.

A new section 3(b)(10) was added, based on Model Act section 4(p). This new section confers upon Indiana corporations the inherent power to pay pensions, establish pension plans, etc.

The third change, discussed below, relates to the power of a corporation to acquire its own shares.

2 Acquisition of Treasury Shares Prior to the 1967 amendments, the general powers section of the act granted to corporations the power to "purchase, own and hold and to sell and transfer (but not to vote) shares of its own capital stock if and when the capital of the corporation is not thereby impaired.” The 1967 amendment eliminated this section and inserted in its place a new section 3a placing additional restrictions on the right of the corporation to purchase treasury shares. Under the act as amended, a corporation has the power to acquire treasury shares only to the extent of unreserved and unrestricted earned surplus and, if the articles of incorporation so provide, to the extent of unreserved and unrestricted capital surplus. In the absence of such a provision in the articles of incorporation, a two-thirds vote of the shareholders is required to permit purchase of treasury shares from capital surplus. In accordance with accepted accounting practices, so long as shares are held as treasury shares, the surplus of the corporation used as the measure of the corporation’s right to purchase such shares is deemed to be restricted. A corporation may purchase its own shares at any time, without regard to surplus available therefor, for the following purposes: (1) eliminating fractional shares; (2) collecting or compromising a debt

64. IND. ANN. STAT. § 25-202(8) (Burns 1960 Repl.).
owed to the corporation; (3) paying dissenting shareholders in connection with a merger, consolidation, or sale of assets; and (4) retiring preferred shares at not to exceed the redemption price. In place of the former limitation that treasury shares could not be acquired if to do so would impair the capital of the corporation, the amendment provides that shares may not be purchased when the corporation is insolvent or when such a purchase would render it insolvent. The amended section is based on Model Act section 5.

3. Redemption and Cancellation The procedures for the redemption of preferred shares and for the cancellation of shares of all the types contained in sections 30 and 30a of the act have been revised in the light of Model Act sections 60, 61 and 62. Under prior law, it was not possible for a corporation to restore shares (other than preferred shares) to the status of authorized but unissued shares. To achieve this result, it was necessary for a corporation to cancel shares acquired by it and then amend the articles of incorporation to reauthorize the shares desired. This anomalous situation has been removed by the 1967 amendments.

Former section 30 appears to provide that "treasury stock" could not be cancelled in the manner set forth in that section. Such a restriction is difficult to explain since all shares acquired by the corporation prior to cancellation or restoration to the status of authorized but unissued fall within the definition of treasury shares, and fell within the definition of "treasury stock" under prior law. This section has been rewritten to eliminate confusion in this regard. The mechanics of former section 30 have not been substantially altered.

Section 30a of the act, which refers to preferred shares, is substantially rewritten to make its provisions parallel to those of section 30. The cancellation procedure for preferred shares is the same as that for other types of shares, except that the information required to be filed in the statement of cancellation refers only to preferred shares and recording of such statement is unnecessary. Section 30a is further amended to provide that a corporation may not redeem or purchase preferred shares when it is insolvent, when such purchase would render it insolvent, or when the purchase would reduce the net assets of the corporation below the aggregate amount payable to the holders.

67. In order to protect the Secretary of State from loss of revenue pending a determination of the amounts involved, the scheme of IND. ANN. STAT. § 25-229a (Burns 1960 Repl.), whereby a corporation pays to the Secretary of State at the time shares are restored to the status of authorized but unissued a fee equal to the fee payable upon the initial issue of that number of shares, was imported into Burns § 25-229.
68. IND. ANN. STAT. § 25-229 (Burns 1960 Repl.).
of senior or equal securities in the event of involuntary dissolution. This provision is section 60 of the Model Act.

4. Options New section 6a provides a statutory procedure for the issuance of options to purchase shares of the corporation. Prior to the amendments, the statute was silent on this subject. The provision is based on Model Act section 18A.

The directors are given the same rights with respect to the issuance of options which they possess with respect to the issuance of securities of the corporation. But when options are to be issued to directors, officers, or employees of the corporation but not to the other shareholders, then such issuance must be approved by the shareholders by majority vote or must be pursuant to a plan which has previously been approved by the shareholders.

5. Dividends Perhaps the single most important change in Indiana corporation law made by the 1967 amendments relates to the power of a corporation to pay dividends. Under prior law, dividends could be paid out of "the surplus earnings or net profits or surplus paid in cash of the corporation." The terms "surplus earnings" and "net profits" were nowhere defined in the act; the term surplus paid in cash, as defined in former section 1(h), appears roughly equivalent to the present definition of surplus. Thus, regardless of the meaning of the three terms used in the former dividend section, it seems to have been the intention of the draftsmen of the prior law to permit a corporation to pay dividends out of any surplus, regardless of its source, except appraisal surplus.

New section 12, derived from sections 40 and 41 of the Model Act, provides that dividends are ordinarily payable only out of unreserved and unrestricted earned surplus. Further, dividends may be paid out of unreserved and unreserved capital surplus, if the articles of incorporation of the corporation contain a specific provision authorizing it. In the absence of such a provision, dividends may be paid out of capital surplus only if such distribution is authorized by the shareholders by majority vote. No dividend may be paid out of capital surplus if the corporation is insolvent, if such distribution would render the corporation insolvent, if there are unpaid cumulative dividends on

70. The Model Act provision was amended on the floor of the Senate by inserting the words in the third sentence "including the consideration, if any, for such rights or options" and by deleting the sentence "[i]n the absence of fraud in the transaction, the judgment of the board of directors as to the adequacy of the consideration received for such rights or options shall be conclusive."
71. IND. ANN. STAT. § 25-211 (Burns 1960 Repl.).
72. Id. § 25-101(h).
73. Burns § 25-211.
preferred shares, or if such distribution would reduce the net assets of the corporation below the aggregate liquidation preference on senior securities of the corporation. Dividends paid out of capital surplus must be identified as such at the time of the distribution.

Because this new section restricts the power of Indiana corporations to pay dividends, new section 12(g) was added to provide that all funds available, at the time the amendments went into effect, for the payment of dividends would continue to be available, regardless of whether such funds constituted earned surplus or capital surplus.

Sections (b) and (c) of section 12 are new but are not thought to change existing law. These sections provide for the payment of share dividends, either out of treasury shares or out of authorized but unissued shares. New section 12(e) provides that a stock split is not to be construed as a share dividend. A stock split for this purpose involves an increase in issued and outstanding shares without any increase in stated capital.

6. Reduction of Stated Capital New section 30b for the first time, imports into the Indiana statute a method whereby the stated capital of the corporation may be reduced without a corresponding cancellation of shares. Under the procedure specified in the new section, the directors may propose to the shareholders a reduction of stated capital and, if the shareholders approve by majority vote, the reduction is effected. In no event may the stated capital of the corporation be reduced below the aggregate par value or liquidation preference of the shares having such a preference, nor may it be reduced below the amount stated in the articles of incorporation as the initial stated capital of the corporation.

F. Special Transactions

1. Procedure for Class Voting Parallel provisions, taken from the Model Act, have been introduced to regulate the procedure in the event a class vote is required for amendment of the articles of incorporation, adoption of a plan of merger or consolidation, adoption

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74. Burns § 25-211(g).
75. Burns § 25-229(b).
76. This section is based on section 63 of the Model Act. In line with the scheme of the Indiana statute in other areas, the new section does not require a filing with the Secretary of State at the time of a reduction in stated capital. This is because the law does not require that the stated capital of the corporation be made a matter of record at any time; a statement to the effect that the capital had been reduced by a certain amount would be meaningless since there would be no method of determining what it had been before the reduction. The Model Act requires such a filing, in line with its policy of making stated capital a matter of public record, in the annual corporation report.
77. Model Act §§ 54, 67, 72, 77.
of a special corporate transaction or sale of all or substantially all of the assets of the corporation, or approval of voluntary dissolution. Under the procedure now prescribed, where a class vote is required, (1) the required percentage of each class entitled to vote as a class must be obtained and (2) the required percentage of all shares entitled to vote with respect to the particular transaction must also be obtained. Holders of shares of a class not entitled to vote as a class need not approve the transaction with the required percentage, so long as the required percentage is obtained of all the shares taken together.79

2. Amendment of Articles Section 25 of the act80 conferring class voting rights on shareholders in certain situations regardless of the terms of such shares, has been substantially rewritten in accordance with section 55 of the Model Act. The amended section continues to provide for a class vote in all cases provided by the former law. In addition, a class vote is provided if the amendment would effect an exchange, reclassification, or cancellation of all or any part of the shares of a class; would effect an exchange or create a right of exchange of all or any part of the shares of another class into the shares of such class; would divide the shares of such class into a series; or would cancel or otherwise affect accrued dividends on the shares of such class.

Section 26 of the act, relating to the filing of amended articles, has been revised in accordance with the new section relating to the contents of the original articles of incorporation. Under the old law, amended articles were required to state the amount of capital of the corporation at the time of the filing of the amended articles. Under the amendment, all that is required is a declaration that the stated capital of the corporation at the time of filing is at least 1,000 dollars or any larger amount which the corporation may specify.

Section 44 of the act82 has been amended to provide that any corporation whose term of existence expires pursuant to a provision of its articles of incorporation will have a period of grace of two years following such expiration during which to extend such period by amendment of its articles. This provision is taken from section 98 of the Model Act.

79. With respect to special corporate transactions and voluntary dissolutions, which must be approved by a two-thirds vote of the shareholders, the articles of incorporation may contain provisions varying this class voting procedure Burns §§ 25-239, 25-241.
3. **Merger and Consolidation** Section 32(b) and 33(c) of the act, relating to merger and consolidation, have been amended to provide that a corporation may not do through an agreement of merger or consolidation anything affecting the government of the corporation which it could not do by amendment of the articles of incorporation. More explicitly, these sections have been amended to provide that any class of shares shall be entitled to vote as a class on the agreement of merger or consolidation if the agreement contains any provisions which, if contained in a proposed amendment to the articles of incorporation, would entitle such class to vote as a class under the provisions of section 25 of the act.

New section 37a, which is based on section 68A of the Model Act, permits a corporation, which owns ninety-five per cent or more of the outstanding shares of every class of another corporation, to merge such other corporation into itself without following the complicated merger provisions of the statute. To accomplish such a "short merger," the board of directors of the parent corporation adopts a plan of merger. The plan must be then mailed to each shareholder of the subsidiary corporation and may be filed with the Secretary of State on or after the thirtieth day after such mailing. Section 37 of the act is amended to provide that the shareholders of the parent corporation have no dissenting shareholder rights in such a short merger. The dissenting rights of the shareholders of the subsidiary are, of course, preserved.

Section 34 is completely rewritten to provide that an agreement of merger or consolidation may fix an effective date which may be different from the date of filing of such articles. Under prior law, a merger or consolidation became effective as of the date of filing. This created certain complications, especially when the parties to the merger or consolidation were not all Indiana corporations.

4. **Dissolution** The only change wrought by the 1967 amendments in the process of voluntary dissolution was to simplify the preparation of articles of dissolution by eliminating the cumbersome requirements of former section 42(b)(4)(VIII) and (IX) which required articles of dissolution to contain (1) a complete itemized list of all corporate

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84. Burns §§ 25-236a.
85. Burns §§ 25-236.
debts and liabilities existing at the time the resolution to dissolve is adopted or incurred thereafter, (2) the date and the manner of payment of each debt and liability, and (3) a complete itemized list of all the corporate assets and property distributed to the shareholders and the date of such distribution. Whatever protection may have been afforded by the requirement that such schedules be attached to articles of dissolution was certainly outweighed by the immensity of the task of preparing such schedules when the corporation continued as a going business until the resolution to dissolve was adopted. In place of such schedules, the act as amended requires only sworn statements that (1) all debts, obligations, and liabilities of the corporation have been paid or that adequate provision has been made for them; (2) the remaining property of the corporation has been distributed to its shareholders; and (3) there are no suits pending against the corporation in any court or that adequate provision has been made for the satisfaction of any judgment which may be entered. These provisions are taken from section 85 of the Model Act.

New section 42a provides for the first time a procedure for the revocation of voluntary dissolution proceedings even after a dissolution resolution has been adopted. This section is based on section 82 of the Model Act but there are two differences. Under the Model Act dissolution is a two step proceeding: first, a notice of intention to dissolve must be filed with the Secretary of State at the time the resolution to dissolve is adopted and second, when the affairs of the corporation are wound up, articles of dissolution are filed and a certificate of dissolution is issued. Section 82 of the Model Act therefore requires the filing of a statement of revocation of voluntary dissolution proceedings with the Secretary of State. This is unnecessary under Indiana law, which relies on publication of a notice of intention to dissolve rather than on a filing of such notice with the Secretary of State.

The Model Act requires a vote of two-thirds of the outstanding shares to revoke voluntary dissolution proceedings; it was felt, however, that if a majority of the shareholders of an Indiana corporation decided that they wished to continue the corporate existence, this should be sufficient to permit revocation of dissolution proceedings.

G. Limitations on Corporation Actions

1. Liability of Directors Section 52 of the act has been substantially rewritten in accordance with section 43 of the Model

89. Burns § 25-241a.
90. Model Act §§ 76-86.
91. Burns § 25-251
Act. Under prior law directors were made liable by statute in only two cases: for the payment of an illegal dividend and for participating in the extension of a loan from the corporation to an officer or director. Three additional grounds for liability are added. The directors are jointly and severally liable for that part of the minimum initial capital of the corporation which is not paid in at the time the corporation begins business. Second, the directors are liable in the case where the corporation purchases treasury shares contrary to the provisions of the act. Third, the directors are liable for improper distributions of liquidation.

2. **Ultra Vires** Section 54 is amended by inserting the provisions of Model Act section 6. This is a most important amendment and makes it clear that no act of a corporation is to be treated as invalid by reason of the fact that the corporation was without capacity or power to do such act. The amended section makes specific reference to conveyances of real property—no longer may it be a cloud on a title to real property that a corporation in the chain of title has no power to buy, own, or sell real estate.

The defense of ultra vires is still open in three cases: (1) in an action by a shareholder to enjoin an unauthorized transaction; (2) in a derivative suit against officers and directors; and (3) in a proceeding by the Attorney General to dissolve the corporation or to enjoin the commission of an unauthorized act.

3. **Revocation of Certificate** Section 51 of the act permits the Attorney General to proceed against a corporation by information to declare a forfeiture of the certificate of incorporation if the corporation has procured its franchise through fraud or failed to file annual reports as required by the act. Section 66 of the act permits the Secretary of State to revoke the certificate of authority of a foreign corporation for violation of various provisions of the act. These

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92. **IND. ANN. STAT.** § 25-251 (Burns 1960 Repl.).
93. Compare **IND. ANN. STAT.** § 25-219(c) (Burns 1960 Repl.) which made the officers and directors (except those dissenting from corporate action) liable for all debts and liabilities of the corporation incurred prior to the receipt of the initial capital and the filing of a declaration of paid-in capital.
94. It should be noted that, unlike the **MODEL ACT**, where the initial stated capital of an Indiana corporation, as the same appears in the articles of incorporation, is greater than 1,000 dollars, the directors are jointly and severally liable for the entire amount and not simply 1,000 dollars, if the corporation begins business before this amount is paid in.
96. **IND. ANN. STAT.** § 25-253 (Burns 1960 Repl.) provided merely that the prosecuting attorney of the county in which the principal office of the corporation was located had the power to bring suit to void any corporate action which was ultra vires.
98. Burns § 25-311.
two sections were amended in 1967 to require sixty days notice to the corporation prior to the invocation of the remedies provided therein.

III. FUTURE LEGISLATIVE ACTION

The amendments to the Indiana General Corporation Act constitute a significant step in the process of modernization and simplification of Indiana corporation law. The task is not finished, however, and in a very real sense can never be finished because each passing year brings new ideas into the field of corporation law and renders obsolete established notions of proper corporation procedures and regulations. Corporation law is a living branch of the law and the legislature must be constantly alert to provide and preserve a framework for corporate action which will encourage corporations to make Indiana their home and, at the same time, preserve needed protection for shareholders and creditors of Indiana corporations.

Serious consideration should be given by future legislatures to eliminating the numerous cumbersome recording provisions of the present act. All pertinent corporate documents are readily available today in the Office of the Secretary of State; persons desiring information or copies of corporate documents may easily obtain them from this office. New data processing equipment is being installed in that office which should substantially simplify the process of corporate record keeping and should make all needed information instantly available to persons seeking it. The present requirement that these documents also be available in the offices of the county recorder seems to add little protection to persons dealing with corporations but rather constitutes a heavy additional burden on corporations, especially corporations doing business throughout the state. The Model Act contains no such recording requirements.99

The 1967 amendments concern themselves principally with the substantive requirements of Indiana corporation law. Thought should now be given to future legislation to modernize the administration of the Indiana act by giving the Secretary of State investigative and rule making power and revising the complicated fee system presently in effect. Consideration might be given to the complete abolition of the fee on issuance of shares in favor of a system whereby a percentage of the corporation income tax is rebated to the Secretary of State to defray the expenses of administering the act.

99. The following states have no requirements for incorporation beyond filing articles of incorporation with the appropriate state official: Alaska, Colorado, Florida, Maryland, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, the District of Columbia, and Puerto Rico. American Bar Foundation, 2 Model Bus. Corp. Act Ann. § 49, ¶ 2.02 (1960).
A current anomaly in Indiana law is that articles of incorporation may be amended and plans of merger and consolidation may be approved by shareholders by a majority vote, while "special corporate transactions" (sales of all or substantially all the assets of the corporation other than in the ordinary course of business) and voluntary dissolution may be undertaken only after an approval of two-thirds of the shareholders. The Model Act specifies a two-thirds vote for each of these transactions. Regardless of whether a two-thirds vote or a majority vote is deemed to be preferable, no substantial justification exists for requiring a two-thirds vote for some of these transactions while permitting others to be accomplished by a simple majority. The articles of incorporation of a corporation may be amended by majority vote to terminate the existence of the corporation as of a certain date. When this is done, the dissolution section, with its two-thirds vote requirement, is effectively circumvented. Consideration should be given to an amendment of the act which would standardize the voting requirements for such transactions.\(^{100}\)

The 1967 amendments applied only to corporations for profit which are incorporated or qualified to do business under the Indiana General Corporation Act. The present state of Indiana not-for-profit corporation laws is confused and legislative consideration should be given to a complete reformation of these acts. In addition to the Indiana General Not-For-Profit Corporation Act, there exist no fewer than nineteen special not-for-profit corporation acts, many of which are directed toward specific bodies or types of bodies. The problem of administration of this legal maze is difficult. A single act should suffice to protect and promote the objects of all not-for-profit corporations.

In addition to the General Act, a variety of acts also exists for business corporations. While special regulatory provisions are necessary in the case of insurance companies, banks, etc., these special regulations could be harmonized with the provisions of the General Act to permit a more efficient administration of the provisions relating to these special types of corporations. The present system is confusing and inefficient. Only when all corporations doing business in Indiana are subject to the provisions of a single act will the state have a truly general corporation act.

\(^{100}\) This problem was considered in detail by the draftsman of the 1967 amendments and by the Indiana Corporation Survey Commission. It was agreed that action in this area would be desirable; however, no agreement could be reached on whether the appropriate requirement was two-thirds or simple majority.