The New York Business Corporation Law and the Department of State: A Constructive Critique

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THE NEW YORK BUSINESS CORPORATION LAW

AND

THE DEPARTMENT OF STATE

A Constructive Critique

HON. CAROLINE K. SIMON †
HON. ABRAHAM N. DAVIS ‡

INTRODUCTION

The new Business Corporation Law, enacted by the legislature in 1961, represents the first extensive revision of the law affecting business corporations in more than thirty years, and, as such, is a forward step in this area. The new

† Caroline K. Simon is Secretary of State of the State of New York. She was appointed to that office by Governor Nelson A. Rockefeller on January 1, 1959. Among her various public offices, Mrs. Simon served for ten years as a commissioner with the New York State Commission Against Discrimination; as a commissioner with the State Youth Commission, and commissioner with the State Workmen's Compensation Board. An attorney active in numerous committees of the Bar, Mrs. Simon has been interested in international jurisprudence, and, in 1958, was legal adviser to the United States Delegation, United Nations Human Rights Commission, 14th Session.

‡ Abraham N. Davis is the Executive Deputy Secretary of State of the State of New York. He was appointed to that office in November 1960. Prior thereto, he was Deputy Secretary of State in charge of the Corporation Division of the Department of State. An attorney, Mr. Davis was appointed
law will become effective on April 1, 1963. It is a modernization of the statute and case law. It clarifies and simplifies the procedure for organizing business corporations, and qualifying foreign corporations to do business in this state, as well as the drafting and filing of instruments which express the authority and power of such corporations. It is a molding and welding of the many suggestions and conflicting opinions presented by interested groups over the years. The product is a legislative document keyed to the public interest.

No law of its magnitude can be expected to have unanimous approval of all interested groups. Criticism of some aspects of the law persist. The legislature now in session can be expected to make some changes, and the legislature of 1963 may add others before the law itself becomes effective.

It is doubtful, however, that many changes of substance will be made that will affect the role to be played by the Department of State, through its division of corporations. And since this article relates primarily to those aspects of the Business Corporation Law with which the Department will be concerned, it is hoped that this analysis involving the drafting and filing of corporate instruments will be useful.

It may be helpful to note the functions now, and heretofore, performed by the division of corporations of the

to both offices by Mrs. Simon, and, at her request, has acted as the liaison official between the Department and the Joint Legislative Committees to Study Revision of Corporation Laws. Mr. Davis is active in various committees of Bar Associations, and has represented the New York County Lawyers Association in litigation involving the suppression of the unlawful practice of the law. He was with the Securities and Exchange Commission in its formative period.

The opinions and views expressed in this article do not necessarily reflect those of the members of the Joint Legislative Committee, its counsel or staff.

1 N.Y. Sess. Laws 1961, ch. 855. This law was enacted at the request of the Joint Legislative Committee to Study Revision of Corporation Laws created by the legislature in 1956. Its first chairman was Senator Frank S. McCullough, and upon his elevation to the Supreme Court, Westchester County, he was succeeded by Senator Warren M. Anderson of Binghamton. The Committee's counsel is Robert S. Lesher, Esq. of Buffalo, New York.
Department of State. It is the recording office for all certificates of incorporation, and all certificates of amendments thereto. It is the place where applications are made by foreign corporations for authority to do business in this state. Its records go back to 1811. Approximately twenty per cent of all corporations organized annually in the United States are organized in this state. More than 30,000 new stock corporations were organized in New York in 1961.

But the division of corporations is more than a recording office. It is the agency that makes the initial decision as to statutory compliance of corporation instruments. Certificates of incorporation, and other corporation instruments offered for filing, are examined by lawyers to make certain they comply with the law. If they do comply, they are filed; if they do not, they are rejected and returned.

The scope of this activity and its effectiveness may be demonstrated by the number of instruments filed and rejected. Between twenty to twenty-five per cent of all instruments offered for filing are rejected for failure in some respect to comply with the law. The number of instruments actually filed in 1961 exceeded 50,000. This means that a total of about 65,000 documents were examined, of which some 15,000 were initially rejected. Had there been no examination of instruments prior to filing, these 15,000 defective instruments would have been filed, probably to be turned up at some later time to plague the corporations, their officers and lawyers.

It has been argued that the Department of State does not have the power to examine and reject instruments. The statute, it is said, gives it no such power. But the courts have sustained the right of the Department to pass on the instruments offered for filing.\(^2\) The fact is that such services are in the public interest.

The Business Corporation Law now makes explicit what has been implicit in the existing laws. Under this new law, it is expressly provided that instruments are to be delivered

\(^2\) As long ago as 1893, the courts have affirmed the power of the Secretary of State to reject a certificate which did not comply with the law. People ex rel. Davenport v. Rice, 68 Hun 24, 22 N.Y. Supp. 631 (Sup. Ct. 1893).
to the Department for filing, and if they conform to the law they are filed by the Department, and thereby become effective.³

When the Business Corporation Law goes into effect, all the statutory law affecting business corporations, domestic and foreign, will be concentrated in one chapter.⁴ Although the General Corporation Law and the Stock Corporation Law are not repealed, they will not be applicable to business corporations.⁵ The General Corporation Law will continue to apply to all other kinds of corporations, and the Stock Corporation Law to corporations such as banking, insurance, transportation, railroad, cooperative, and stock corporations which are authorized to be formed under the Stock Corporation Law by some other statute of this state other than the Stock Corporation Law itself.⁶

By concentrating all the statutory law relating to business corporations into one chapter, the problems encountered in searching for related but scattered provisions of law set forth in the General Corporation Law and the Stock Corporation Law are eliminated. If no more than this had been accomplished, the Business Corporation Law would deserve approbation.

There has been a further concentration of material within the Business Corporation Law by a conscious effort to keep as much related material as possible within specific articles. For instance, Article 1 deals with general matters relating to all instruments provided for in the chapter. Thus, all instruments delivered to the Department of State must be in the English language, except a certificate of existence of a foreign corporation (which must be part of an application of a foreign corporation for authority to do business here)⁷ which, in turn, must be translated into English.⁸ An address required to be stated in an instrument

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³ N.Y. Bus. Corp. Law § 104(e),(f); see N.Y. Bus. Corp. Law §§ 402 (a), 403, 1304(a).
⁴ See N.Y. Bus. Corp. Law § 101.
⁵ N.Y. Bus. Corp. Law §§ 103(a), (e).
⁶ N.Y. Bus. Corp. Law § 103(e).
⁷ N.Y. Bus. Corp. Law § 104(a).
⁸ N.Y. Bus. Corp. Law §§ 104(a), 1304(b).
must include the street and number, or some other particular description.\(^9\) Wherever the date of the filing of a certificate of incorporation by the Department of State is required to be set forth, it means the original certificate of incorporation.\(^{10}\) (This should not be confused with a subsequent provision to the effect that when a restated certificate of incorporation is filed by the Department, the original certificate of incorporation is superseded, and the restated certificate of incorporation shall be the certificate of incorporation of the corporation.) \(^{11}\) Who may sign instruments, and who may be alternative signatories, are set forth,\(^{12}\) thereby clarifying what always has been a troublesome problem. If more than one person signs an instrument, only one of them need verify or acknowledge the instrument, whichever is required.\(^{13}\) Authentication of the signature of a person administering an oath or taking an acknowledgment is no longer required.\(^{14}\) At present, one not only finds references to these matters scattered about, but also often repeated in various sections of the General Corporation Law and the Stock Corporation Law. The new law now fixes a definite date of effectiveness of instruments, to wit, the date when they are filed by the Department of State.\(^{15}\)

**Names of Corporations**

(Article 3 of the Business Corporation Law)

The first step in the direction of creating a corporate entity, or in qualifying a foreign corporation to do business in this state, should be the clearance with the Department of State of the name to be used, or the acceptability of the name of the foreign corporation. The name problem is one of the most difficult encountered in the administration of the corporation laws.

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\(^9\) N.Y. Bus. Corp. Law § 104(b).
\(^{10}\) N.Y. Bus. Corp. Law § 104(c).
\(^{11}\) N.Y. Bus. Corp. Law § 807(f).
\(^{12}\) N.Y. Bus. Corp. Law § 104(d).
\(^{13}\) N.Y. Bus. Corp. Law §§ 104(d), 615(c).
\(^{14}\) N.Y. Bus. Corp. Law § 104(e).
\(^{15}\) See note 4 supra.
By and large, the present provisions of Section 9 of the General Corporation Law have been carried over into the new Business Corporation Law.  

Corporate identity must be disclosed by the use in the name of the word “corporation,” “incorporation,” or “limited,” or some abbreviation thereof, and if a foreign corporation, it must add one of such words or abbreviation thereof if not already included. It should be noted that the identifying word or abbreviation need not be at the end of the name but may appear anywhere, except in the case of a foreign corporation which does not already have it, in which event the statute states it must be added at the end of the name.

The name shall not be the same as that of any type or kind of corporation that appears on the index of names of existing domestic or foreign corporations maintained by the Department of State, division of corporations, or a reserved name, or a name so similar thereto “as to tend to confuse or deceive.”

There are some changes in language and substance from existing law which should be noted. The present provisions of law prohibit the use of the same name as one being used by any domestic or foreign corporation authorized to do business here. In applying these sanctions, the Department rejects any proposed name which is the same as the name of any corporation that appears on its index panels of existing corporations. These index panels, alphabetically arranged, contain the names of every “type and kind” of live or existing corporation, domestic and foreign authorized to do business here, including stock and non-stock corporations. In practice, therefore, the Business Corporation Law makes explicit the practices of the division of corporations under the existing law.

With respect to the ban on the use of “similar” names, the Business Corporation Law prohibits the use of names

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16 N.Y. Bus. Corp. Law art. 3.
18 N.Y. Bus. Corp. Law § 301(a)(2).
which "tend to confuse or deceive." This permits a broader application of the prohibition than does the present law which reads "as to be calculated to deceive." Thus the concept of similarity, under the Business Corporation Law, need not depend on deception. If similarity would "tend to confuse or deceive," it is prohibited.

Carried over from the General Corporation Law is the prohibition against the use of a word or phrase, or any abbreviation or derivative thereof, (a) the use of which is expressly prohibited or restricted by any other statute, or (b) in a context which indicates or implies a purpose or power which the corporation does not possess, or (c) which is listed in the statute as a prohibited word.

The Business Corporation Law provides for reservation of names and to the same ban against the use of the same or similar names of existing corporations are added the names reserved for future use.

Certain exceptions to the prohibited use of names are carried over from the present law.

One new exception should be mentioned. A foreign corporation applying to do business in this state which has a name similar to the name of an existing corporation, or a reserved name, may be accepted, if the Department of State finds, upon proof by affidavit or otherwise, that the applicant has engaged in business under that name for not less than ten consecutive years immediately prior to the application, that its business is not the same as or similar to that of the already existing corporation, that the public is not likely to be confused or deceived, and the applicant agrees to add to its name, when used in this state, the words "a (name of jurisdiction of incorporation) corporation." This exception will permit foreign corporations which have become well known to come into the state

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20 Ibid.
21 N.Y. Bus. Corp. Law § 301(3),(4),(5).
22 N.Y. Bus. Corp. Law § 303.
24 N.Y. Bus. Corp. Law § 302(b)(3).
without damage to corporations already in existence. This has not been possible in the past.

The problem that daily confronts the division of corporations with respect to the conflict of names will not be eased by the Business Corporation Law. Bearing in mind that the index of existing or live corporations in that division totals somewhere between three and four hundred thousand, the impact of adding thereto reserved names can only increase its volume of work.

Before concluding this discussion of conflicting names, attention should be directed to the fact that coined words created out of prohibited words have not been accepted. Nor are misleading names acceptable. The policy of the Department of State is to grant a name requested whenever it is possible. The determination made by the Department in each case involves the exercise of judicial discretion.

**Reservation of Names**

(Article 3 of the Business Corporation Law)

Under the present law, a name may be reserved only if it is to be used as a change of the name of either an existing domestic corporation or a foreign corporation already authorized to do business in this state.

In addition to the foregoing purposes, the Business Corporation Law also provides for the reservation of a name to be used by a domestic corporation to be formed, or by a foreign corporation to be formed which intends to apply for authority to do business in this state, or by a foreign corporation in existence which intends to apply for authority to do business here.

The name to be reserved must, of course, be available,

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29 N.Y. BUS. CORP. LAW § 303(a).
30 N.Y. BUS. CORP. LAW § 303(b).
which means that it does not contravene the provisions of Section 301 of the Business Corporation Law. An application for reservation must be made to the Department of State; if it conforms to the statutory provisions, and the name is available, it will be filed by the Department of State and a certificate of reservation good for sixty days will be issued.\footnote{Ibid.} For good cause shown by affidavit, two extensions, not exceeding sixty days each, may be granted.\footnote{\textit{N.Y. Bus. Corp. Law} § 303(c).}

The certificate of reservation is required to be returned to the Department with the instrument incorporating the reserved name to insure that it is given to the party who made the reservation.

The reservation of a name will not preclude its rejection when it is used in the instrument which seeks to effectuate the purpose of reservation, if it shall then appear that the name contains a word or phrase, or an abbreviation or derivative which is prohibited or restricted by statute, or if the name, in its context, indicates or implies a power, authority or purpose other than that for which the corporation may be formed, or contains a word specifically prohibited, or is not approved by the appropriate authority if prior approval is required.\footnote{\textit{N.Y. Bus. Corp. Law} §§ 303(b), 301(a)(3)(4)(5)(6).}

In other words, a reserved name indicates only availability but not approval and acceptance. Acceptability of a name is determined when the facts are disclosed at the time the instrument containing the name is offered to the Department of State and examined. Until filed the name is not approved or accepted.

\textbf{CORPORATE POWERS AND PURPOSES}

\textit{(Article 2 of the Business Corporation Law)}

Before taking up the "Formation of Corporations" it seems logical to discuss the purposes for which business corporations may be created, and the powers granted to
them which need not be set forth in the certificate of incorporation.\footnote{34}{See N.Y. Bus. Corp. Law § 402(b).}

A corporation may be formed for any lawful business purpose other than one for which a corporation may be organized under some other statute, unless that other statute permits formation under the Business Corporation Law.\footnote{35}{N.Y. Bus. Corp. Law § 201(a); see N.Y. Bus. Corp. Law § 103(e).} But, notwithstanding the business purposes stated in its certificate of incorporation, in time of war or other national emergency and at the request or direction of any competent governmental authority, a corporation may engage in any lawful business in aid thereof during such period.\footnote{36}{N.Y. Bus. Corp. Law § 201(b).} This recognizes the need for submission to governmental authority in an emergency, and avoids any question of legal propriety to engage in a business in which its stockholders did not intend the corporation to be engaged.

Subject to the limitations contained in the Business Corporation Law, or in any other statute of the state, or in its certificate of incorporation, all business corporations will have the powers that article 2 sets forth.\footnote{37}{N.Y. Gen. Corp. Law §§ 13, 14, 17, 18, 34, 35; N.Y. Stock Corp. Law §§ 5, 15, 16, 18, 19, 60.} These general powers, described in one section of the Business Corporation Law, now are scattered about in the General Corporation Law and the Stock Corporation Law.\footnote{38}{N.Y. Bus. Corp. Law § 402(b).}

Although these general powers need not be set forth in the certificate of incorporation,\footnote{39}{N.Y. Bus. Corp. Law § 202.} undoubtedly many certificates will include them. If the inclusion will be in the language of the section under discussion, serious problems will arise as to the acceptability of the certificate for filing. The caveat expressed in the opening sentence of the section must always be kept in mind, to wit, that the enumerated powers are subject to the other provisions of the Business Corporation Law and to other statutes of the state. Ten of the sixteen powers enumerated are limited or controlled...
by other provisions of the Business Corporation Law. It is doubtful that any certificate of incorporation that contains these ten powers in the wording of the section would be filed by the Department.

It seems, therefore, that discretion imposes the need to omit all reference to the enumerated powers. They exist without inclusion. It is suggested that only if the incorporator intends to create restrictions beyond those imposed by the related provisions, which means greater and not lesser restrictions, should they be set forth with such restrictions.

For instance, subdivision 5 of Section 202 of the Business Corporation Law confers the power to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property or interest therein, wherever situated. If no more than this were stated verbatim in the certificate of incorporation, it would be rejected because that power is limited by the provisions of Section 909 of the Business Corporation Law. That section provides that the disposition, as enumerated in the aforementioned subdivision 5, of all or substantially all of the assets of a corporation, if not made in the usual or regular course of the business which is actually being conducted, shall be authorized only in accordance with the following procedure:

(1) the board of directors must approve and direct its submission to a vote of the shareholders;

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40 The following subdivisions in N.Y. Bus. Corp. Law § 202 have related sections in that law, or in some other statute:

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(2) all shareholders, whether or not entitled to vote, shall be given notice of the meeting;

(3) two-thirds of all outstanding shares entitled to vote must authorize the disposition, and the holders thereof may fix the terms and conditions of the disposition or authorize the directors to fix them.

Section 909 further provides that the consequences of such a disposition of all or substantially all of the assets of the corporation, which includes its name, if made to a new corporation under the same name, is that the transferrer corporation is automatically dissolved after the expiration of thirty days from the date of filing the certificate of incorporation of the new corporation, unless the name of the old corporation is changed.

There is no point to inserting all these conditions in a certificate of incorporation, unless, for instance, unanimous approval of shareholders is required or any proportion in excess of two-thirds. A certificate that would require less than two-thirds would not be acceptable.

Of course, a certificate that sets forth verbatim the powers described in Section 202 of the Business Corporation Law and adds thereto some such phrase as “in accordance with provisions of law,” probably would be accepted. But why add the provision at all, when that power applies automatically if carried out in “accordance with the provisions of law”?

It is unnecessary to belabor the point, but perhaps one further illustration will help clarify it. Under subdivision 7 of section 202, a corporation is empowered to “give guarantees.” However, Section 908 of the Business Corporation Law expressly states that a guarantee which is not in furtherance of the corporation's purposes must be approved at a meeting of shareholders by the vote of two-thirds of the outstanding shares entitled to vote thereon. A certificate of incorporation could require a greater proportion but not a lesser one.

Having presented a birds-eye view of some preliminary factors which must be understood before the corporation is
actually created, the "Formation of Corporations" may now be examined.

FORMATION OF CORPORATIONS
(Article 4 of the Business Corporation Law)

Only one adult is required to be an incorporator, although more than one may be incorporators. Neither infants nor corporations may be incorporators. It will no longer be necessary to have a minimum of three incorporators, a prescribed number of whom must be residents, citizens and subscribers for shares. These four qualifications are being abolished.

The form of the certificate of incorporation is set forth in section 402 and must be followed. It must be signed by each incorporator, and set forth his name and address, and it must be acknowledged by one of the signers.

The purposes for which the corporation is formed must be set forth. This is a salutary carry over from the present law. Examinations of certificates of incorporation have frequently disclosed purposes deemed legal, but which are not. Advising the interested parties of the impropriety of a purpose has resulted in corrections which undoubtedly have prevented later difficulties.

The plea of ultra vires would have little efficacy, if any at all, unless the purposes are set forth. The attorney general would not be able to determine readily when he may institute an action for dissolution. Without a statement of purposes, it would be practically impossible to determine whether a name is misleading. And if the consent of a particular department were necessary because of the nature of the business, it would be impossible to require

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41 N.Y. Bus. Corp. Law § 401.
43 See N.Y. Bus. Corp. Law § 402(a).
44 N.Y. Bus. Corp. Law § 402(a)(2).
45 N.Y. Stock Corp. Law § 5.
46 See N.Y. Bus. Corp. Law § 203.
it as a condition for filing a certificate of incorporation, unless the purposes were made known. Once a certificate is filed, it is conclusive evidence that all conditions precedent have been met. The inclusion of the purpose clause is in the public interest.

By inserting the word "incorporated" before the word "village," in the requirement to set forth the "city, incorporated village or town and the county" where the office of the corporation is to be located, the statute has made explicit what the law required in the absence of the word "incorporated." The General Construction Law states that "village" means "incorporated village." Nevertheless, many certificates of incorporation have been rejected because the village named in the certificate was not an incorporated village.

The capital of the corporation need not be stated. However, it will be necessary to state the number of shares the corporation will be authorized to issue, the par value, if they are to have par value, or a statement that they will be without par value, if that is the case; and if there are to be more than one class of shares, the number authorized for each class, the designation of par value, if any, of each class, or that they are without par value; and the designations, relative rights, preferences and limitations of each class. If preferred shares are to be issued in series, the statute prescribes what must be set forth in the certificate.

Shares which are entitled to a preference in the distribution of dividends or assets may not be designated as common shares, and shares not entitled to such a preference may not be designated as preferred shares.

Section 509 of the Business Corporation Law authorizes

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48 N.Y. Bus. Corp. Law § 403.
51 N.Y. Bus. Corp. Law § 402(a)(4).
52 N.Y. Bus. Corp. Law § 402(a)(5).
54 N.Y. Bus. Corp. Law § 501(b).
a corporation to issue certificates for fractions of shares, which will entitle the holder, in proportion to his fractional holdings, to voting rights, dividends, and distributions on liquidation. Although not as clear as it should be, it would seem that it was not intended to allow a corporation to provide in its certificate of incorporation for the issuance of all its shares in fractions. Section 513 of the Business Corporation Law provides that out of its stated capital, a corporation may purchase its own shares to eliminate fractions of shares. Under Section 802 of the Business Corporation Law a corporation may reduce its stated capital by an amendment of its certificate of incorporation which eliminates from authorized shares, shares that have been issued and reacquired by the corporation.

Although the provisions for designating the Secretary of State as the agent of the corporation upon whom process may be served are carried over from the present law without substantial change, if a corporation chooses also to designate a registered agent upon whom process may be served, his name and address within this state, and a statement to the effect that he is the registered agent upon whom process against it may be served, must be included in the certificate of incorporation or in an amendment thereto; a registered agent may be changed or removed or he may resign. Process may then be served upon either the Secretary of State or the registered agent.

It will no longer be necessary to state in the certificate that the corporation is to have perpetual existence, but the duration of existence, if less than perpetual, must be stated.

The certificate of incorporation may include any other provisions relating to its business, affairs, rights or powers, or the rights or powers of its shareholders, directors or officers, providing they are not inconsistent with any other

55 N.Y. Bus. Corp. Law § 402(a) (8); see N.Y. Bus. Corp. Law §§ 305, 306.
56 N.Y. Bus. Corp. Law § 305(a).
57 See N.Y. Bus. Corp. Law § 202(a) (1).
58 N.Y. Bus. Corp. Law § 402(a) (9).
provision of the Business Corporation Law or with any other statute of the state.\textsuperscript{59}  

In effect, this means that the statutory provisions are the irreducible minimum. For instance, shares without par value may be issued for such consideration as the board of directors may determine, unless the certificate of incorporation reserves to the shareholders the right to fix the consideration.\textsuperscript{60} Without any provision in the certificate to the contrary the directors will fix the consideration. If rights or options are to be created in some special way, it may be provided for in the certificate.\textsuperscript{61} Voting powers of shareholders are governed by the statute.\textsuperscript{62} A majority of voting shareholders is required to constitute a quorum, unless the certificate provides for less, but the certificate may not provide that a quorum shall be less than one-third of the shares entitled to vote.\textsuperscript{63} An amendment to a certificate of incorporation requires the votes of a majority of all outstanding shares entitled to vote, but if more than a majority is desired it must be set forth in the certificate.\textsuperscript{64} The powers of directors in the management of the corporation may be restricted if so specified in the certificate of incorporation and consented to by all the incorporators, or in an amendment thereto consented to and authorized by all the incorporators or holders of record of all outstanding shares, whether or not having voting power, provided the shares of the corporation are not traded on a national securities exchange, or regularly traded in the over-the-counter-market.\textsuperscript{65} If a quorum of directors is to be more than the minimum specified in the statute\textsuperscript{66} it must be stated in the certificate.\textsuperscript{67}

Therefore, as in the case of the general powers which

\textsuperscript{59} N.Y. Bus. Corp. Law \S 402(b).
\textsuperscript{60} N.Y. Bus. Corp. Law \S 504(d).
\textsuperscript{61} N.Y. Bus. Corp. Law \S 505.
\textsuperscript{62} See N.Y. Bus. Corp. Law art. 6.
\textsuperscript{63} N.Y. Bus. Corp. Law \S 608.
\textsuperscript{64} N.Y. Bus. Corp. Law \S 616(b).
\textsuperscript{65} N.Y. Bus. Corp. Law \S 620(b),(c).
\textsuperscript{66} N.Y. Bus. Corp. Law \S 707.
\textsuperscript{67} N.Y. Bus. Corp. Law \S 709.
need not be set forth in the certificate,\(^6\) it is essential that the provisions of the statute are known before any changes or references thereto are made in the certificate.

In view of the foregoing discussion, perhaps attention should be directed to the absence of authority to make provisions for indemnification of directors and officers except as provided by the statute. The statutory provisions are exclusive.\(^6\)

The effect of filing a certificate of incorporation has been changed. Upon filing of the certificate by the Department of State, corporate existence begins, and the certificate is conclusive evidence that all conditions precedent have been fulfilled and that the corporation has been formed under the Business Corporation Law, except in any action or special proceeding brought by the attorney general.\(^7\)

Under the present law, a filed certificate of incorporation is only presumptive evidence of incorporation.\(^7\)

**AMENDMENTS AND CHANGES**

(Article 8 of the Business Corporation Law)

This article makes some significant changes in the law, and, to some extent, also simplifies the procedure for amending or changing the provisions of a certificate of incorporation.

One recurring problem in the past involved the erroneous reference to the proportion of votes of shareholders required to authorize an amendment. This is greatly reduced by the general application to most amendments of the requirement of a simple majority, and the authority given to the board of directors to make certain simple changes in the certificate.\(^7\)

Any amendment of a certificate of incorporation may be made at any time and in as many respects as desired,

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\(^6\) See N.Y. Bus. Corp. Law § 202; note 40 supra.

\(^6\) N.Y. Bus. Corp. Law § 721.

\(^7\) N.Y. Bus. Corp. Law § 403.

\(^7\) N.Y. Gen. Corp. Law § 12(1).

\(^7\) N.Y. Bus. Corp. Law § 803.
provided only that the amendments are of such a nature as may be included in a certificate of incorporation filed when the amendment is made. The illustrations set forth in the section authorizing such amendments do not limit the kind or nature of permissible amendments.

An important change made in the new law is to permit a corporation created by special act to make any of the changes authorized to corporations created under the Business Corporation Law. The provision in the Stock Corporation Law that a corporation organized by or under a special law may not file a certificate of amendment changing the general character of its business has been eliminated.

Although reduction of stated capital, defined in the act, may be made without amending the certificate of incorporation, it may also be made by a certificate of amendment, in which event the certificate shall set forth the manner by which it is effected, and the amounts from which and to which stated capital is reduced. Reduction of stated capital is limited by express provisions in the article.

There is a distinction between simple changes and amendments to the certificate of incorporation. The following simple changes may be authorized by the board of directors:

(1) a change in the location of the office of the corporation;

(2) a specification or change in the address to which the Secretary of State shall mail copy of process against the corporation;

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73 N.Y. Bus. Corp. Law § 801(a).
74 N.Y. Bus. Corp. Law § 801(b).
75 N.Y. Bus. Corp. Law § 801(c).
76 N.Y. Stock Corp. Law § 38(5).
77 N.Y. Bus. Corp. Law § 102(12).
78 N.Y. Bus. Corp. Law § 516.
79 N.Y. Bus. Corp. Law § 802.
80 N.Y. Bus. Corp. Law § 805(a)(5).
81 N.Y. Bus. Corp. Law § 806(b)(3).
(3) to make, revoke or change the designation of a registered agent, or his address.\textsuperscript{82}

A certificate which includes only the changes approved by the board, as indicated, must be entitled "Certificate of change as to (name of corporation) under section 805 of the Business Corporation Law."\textsuperscript{83}

All other amendments of a certificate of incorporation are authorized by the vote of the holders of a majority of all outstanding shares entitled to vote thereon,\textsuperscript{84} unless the certificate of incorporation requires a greater proportion than a majority.\textsuperscript{85} If an amendment adds a provision to increase the proportion of shares to constitute a quorum, or to increase the proportion of votes of shareholders necessary for the transaction of any business, including amendments, then the vote of two-thirds of all outstanding shares is required.\textsuperscript{86}

It must also be noted that certain amendments require the votes of a majority of holders of different classes of shares, notwithstanding any provision to the contrary in the certificate of incorporation.\textsuperscript{87} Generally speaking, this arises when a proposed amendment would exclude or limit the right of a class to vote on any matter, would change, classify or reclassify their shares, where conversion rights are created or affected, or where they are to be subordinated to newly authorized shares.

An amended certificate must be entitled "Certificate of amendment of the certificate of incorporation of (name of corporation) under section 805 of the Business Corporation Law."\textsuperscript{88} It must be signed and verified\textsuperscript{89} and set forth the provisions contained in section 805. No longer will it be necessary to accompany amendments with the affidavits

\textsuperscript{82}N.Y. Bus. Corp. Law § 803(b).
\textsuperscript{83}N.Y. Bus. Corp. Law § 805(c).
\textsuperscript{84}N.Y. Bus. Corp. Law § 803(a).
\textsuperscript{85}N.Y. Bus. Corp. Law § 616.
\textsuperscript{86}N.Y. Bus. Corp. Law § 616(b). See also N.Y. Bus. Corp. Law §§ 502, 515, 519, 620, 709.
\textsuperscript{87}N.Y. Bus. Corp. Law § 804.
\textsuperscript{88}N.Y. Bus. Corp. Law § 805(a).
\textsuperscript{89}See N.Y. Bus. Corp. Law § 104(d).
required by subdivisions 3, 4 and 5 of Section 37 of the Stock Corporation Law. Statements to the same effect are to be contained in the certificate of amendment, albeit in much simpler form.

A restated certificate of incorporation, to be entitled "Restated certificate of incorporation of (name of corporation) under section 807 of the Business Corporation Law," may be filed by the Department of State, in which event it supersedes the original certificate of incorporation, as theretofore and therein amended, and becomes the certificate of incorporation.

It must be understood that when a restated certificate of incorporation becomes the certificate of incorporation, the date of incorporation has not been changed. The Business Corporation Law expressly provides that whenever an instrument is required to set forth the date when a certificate of incorporation was filed, it means the original certificate of incorporation.

A restated certificate of incorporation may be authorized by the board of directors where no changes are made and where it contains the simple changes which may be made by the board. However, if the restated certificate includes further amendments, it must be authorized by the holders of the required number of the shares entitled to vote thereon.

The Business Corporation Law provides for a majority vote of shareholders. An amendment is pending to make the proportion of vote required conform to the requirements of the law. This may mean a majority, or two-thirds, or more if the certificate of incorporation so provides.

The contents of the restated certificate are set forth in the section. It will no longer be necessary to include therein any reference to the incorporators, subscribers or directors who appear in original certificates of incorpora-

90 N.Y. Bus. Corp. Law § 807(b).
91 N.Y. Bus. Corp. Law § 807(f).
92 N.Y. Bus. Corp. Law § 104(c).
93 N.Y. Bus. Corp. Law § 807(a).
94 Ibid.
The exclusion of authority to file restated certificates by corporations formed under a special act of the legislature has been eliminated. Such corporations will be able to file restated certificates.

A corporation in reorganization under an act of Congress may put into effect any changes authorized by the plan and decree of the court and permitted by statute, without approval of directors or shareholders. The change made here is the reference to "any applicable act of congress" rather than to limit it to the National Bankruptcy Act.

If a new corporation is created by the decree in a reorganization proceeding, or a new foreign corporation is authorized to do business in this state, and the decree authorizes the adoption of the same or a similar name as that of the corporation being reorganized, the certificate of incorporation of such new corporation, or the application of the new foreign corporation to do business here, shall state that it is presented pursuant to the decree, and shall be endorsed with the consent of the court having jurisdiction. Upon filing such new certificate or application, as the case may be, the reorganized corporation may no longer use its name, except in connection with the reorganization proceedings to wind up its affairs, and it shall be deemed dissolved, or its authority to do business shall cease, thirty days after such filing.

The consent or approval of any state official or department to a certificate of incorporation is not waived by the reorganization section.

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95 N.Y. Bus. Corp. Law § 807(c).
96 N.Y. Stock Corp. Law § 40(8).
97 N.Y. Bus. Corp. Law § 808(a).
99 N.Y. Bus. Corp. Law § 808(b).
100 N.Y. Bus. Corp. Law § 808(1).
MERGER OR CONSOLIDATION
(Article 9 of the Business Corporation Law)

A certificate of merger or consolidation, to become effective, must be filed by the Department of State, and therefore deserves some consideration in any discussion on filing procedures under the Business Corporation Law.

There always has been some confusion between merger and consolidation under the Stock Corporation Law.\textsuperscript{101} Under the Business Corporation Law the precise meaning of "merger" and "consolidation" and related terms are set forth.\textsuperscript{102} The application of the statute thus becomes clear and meaningful, and practitioners are readily able to determine whether a merger or consolidation is involved, and what kind of certificate must be presented to the Department of State for filing.

The procedure for merger or consolidation is set forth in Article 9 of the Business Corporation Law. Important in respect of the document to be submitted to the Department of State for filing is that in a merger one of the corporations involved is the survivor, and in a consolidation a new corporation is created into which all corporations involved are included.

The plan for a merger must include any amendments which are to be made to the certificate of incorporation of the surviving corporation; the plan for a consolidation must include all the statements required to be included in a certificate of incorporation of a corporation organized under the Business Corporation Law.\textsuperscript{103}

After the plans have been approved by the directors and by the vote of two-thirds of the shareholders of all outstanding shares entitled to vote, and the same proportion of the holders of each class of outstanding shares, even though the certificate of incorporation contained no provision for such voting by classes,\textsuperscript{104} a certificate of merger

\textsuperscript{101} See N.Y. Stock Corp. Law § 86.
\textsuperscript{102} N.Y. Bus. Corp. Law § 901.
\textsuperscript{103} N.Y. Bus. Corp. Law § 902(a) (4).
\textsuperscript{104} N.Y. Bus. Corp. Law § 903.
or consolidation entitled "Certificate of merger (or consolidation) of (names of corporations) into (name of corporation) under section 904 of the Business Corporation Law," signed and verified on behalf of each constituent corporation, must be delivered to the Department of State, and to become effective must be filed by the Department.

Merger of a subsidiary corporation by a parent owning at least ninety-five per cent of the outstanding shares of each class may be effected without authorization of shareholders, in much the same way as is now provided by the Stock Corporation Law.

A change with respect to the date of effectiveness of a merger or consolidation has been made. Under existing law the merger or consolidation becomes effective when the certificate is filed. This was a troublesome matter when there were other states in which such certificates had to be approved and filed, or when it was necessary to coordinate financial transactions essential to the parties before the merger or consolidation could be concluded. No certificate of merger or consolidation which postponed effectiveness could be accepted for filing by the Department of State under the present law.

The Business Corporation Law has made an important contribution to the procedure of merger or consolidation by providing that the merger or consolidation becomes effective upon filing of the certificate of merger or consolidation by the Department of State, or on such date subsequent to such filing, not to exceed thirty days, as shall be set forth in the certificate, and similarly for a merger or consolidation between a domestic and foreign corporation.

In case of a merger, the certificate of incorporation of the surviving corporation is deemed amended to the

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105 N.Y. Bus. Corp. Law § 904(a).
106 N.Y. Bus. Corp. Law § 905(a); see N.Y. Bus. Corp. Law § 907.
107 See N.Y. Stock Corp. Law § 85.
108 N.Y. Stock Corp. Law § 89.
109 N.Y. Bus. Corp. Law § 906(a).
110 N.Y. Bus. Corp. Law § 907(f).
extent provided for and set forth in the plan of merger; in a consolidation, the statements set forth in the certificate of consolidation shall be its certificate of incorporation. ¹¹¹

The procedure for merging or consolidating domestic and foreign corporations is substantially different from the existing law. ¹¹²

FOREIGN CORPORATIONS
(Article 13 of the Business Corporation Law)

Because the procedure for qualifying a foreign corporation to do business in this state requires filing of instruments by the Department of State, some reference should be made to the new procedure for qualifying foreign corporations.

A foreign corporation which seeks authority to do business here under the Business Corporation Law must submit to the Department of State an application entitled "Application for authority (name of corporation) under section 1304 of the Business Corporation Law," signed and verified by an officer or attorney-in-fact. ¹¹³

Before the application is transmitted to the Department of State the availability of the name should be checked, and if available, the name should be reserved. ¹¹⁴

It should be noted that the application for authority must set forth the information required by the statute, which includes some new items, such as the name of a registered agent, if it is to have one, ¹¹⁵ and a statement that the corporation has not, since its incorporation, or since it last surrendered its authority to do business here, engaged in any activity in this state, or in lieu thereof, the applicant must attach the consent of the state tax commission to its application. ¹¹⁶

¹¹¹ N.Y. BUS. CORP. LAW § 906(b)(4).
¹¹² See N.Y. BUS. CORP. LAW § 907; N.Y. STOCK CORP. LAW § 91.
¹¹³ N.Y. BUS. CORP. LAW § 1304(a).
¹¹⁴ See N.Y. BUS CORP. LAW §§ 301, 302(b)(3), 303.
¹¹⁵ N.Y. BUS. CORP. LAW § 1304(a)(6).
¹¹⁶ N.Y. BUS. CORP. LAW § 1304(a)(7).
Authority to do business is conferred by the filing of the application by the Department of State.\textsuperscript{117} No certificate of authority will be issued. A notice of filing will be issued by the Department.

A foreign corporation may be authorized to engage in this state in any business which it is authorized to do in the jurisdiction of its incorporation, and, as an important qualification, any business which may be done in this state by a domestic corporation, but no other business.\textsuperscript{118} By definition, a domestic corporation means a corporation for profit organized under the Business Corporation Law.\textsuperscript{119}

The statute expressly prohibits a foreign corporation from engaging in business here unless it has been authorized so to do.\textsuperscript{120} To assist foreign corporations to determine whether authority to do business is necessary, the Business Corporation Law sets forth a list of activities which are held not to constitute doing business. This list is not intended to be exclusive, nor is it intended thereby to establish a standard for activities which may subject a foreign corporation to service of process under the Business Corporation Law, or under any other statute of this state.\textsuperscript{121}

An application for authority to do business may be amended,\textsuperscript{122} surrendered\textsuperscript{123} or terminated.\textsuperscript{124}

If an authorized foreign corporation has changed its name in its home state, it must deliver to the Department of State a certificate amending its application accordingly within twenty days after the change of name became effective; failure to amend the application within the time specified results in automatic suspension of its authority to do business here; such suspension, however, may be lifted or annulled by the filing of an amendment changing

\textsuperscript{117} N.Y. Bus. Corp. Law § 1305.
\textsuperscript{118} N.Y. Bus. Corp. Law § 1301(a).
\textsuperscript{119} N.Y. Bus. Corp. Law § 102(4).
\textsuperscript{120} N.Y. Bus. Corp. Law § 1301(a).
\textsuperscript{121} N.Y. Bus. Corp. Law §§ 1301(b), (c).
\textsuperscript{122} N.Y. Bus. Corp. Law §§ 1308, 1309.
\textsuperscript{123} N.Y. Bus. Corp. Law § 1310.
\textsuperscript{124} N.Y. Bus. Corp. Law § 1311.
its name within one hundred and twenty days of the change in the home state.\textsuperscript{125}

The various forms to be delivered to the Department of State are quite simple and are set forth in detail in the statute.\textsuperscript{126}

\textbf{SERVICE OF PROCESS ON THE SECRETARY OF STATE}

(Article 3 of the Business Corporation Law)

Because the right to serve process against domestic and foreign corporations upon the Secretary of State creates a contact between the public and the Department of State, this article will be concluded with some reference to this subject.

As heretofore indicated, every certificate of incorporation of a domestic corporation must designate the Secretary of State as agent upon whom process may be served, and must set forth the post office address to which the Secretary of State shall mail a copy of the process served upon him.\textsuperscript{127} Every foreign corporation seeking authority to do business here must make the same designation and provide the address for transmittal of process as is required of domestic corporations.\textsuperscript{128}

All designations of the Secretary of State, made by domestic or foreign corporations, when the Business Corporation Law takes effect shall continue thereafter, and every domestic or foreign corporation, existing or authorized to do business on the effective date of the act, which has not designated the Secretary of State as such agent, shall be deemed to have done so.\textsuperscript{129} Any designated address to which the Secretary of State shall mail a copy of process shall continue until the filing of a certificate under the Business Corporation Law directing the mailing to a different address.\textsuperscript{130}

\textsuperscript{125} N.Y. Bus. Corp. Law § 1309(b).
\textsuperscript{126} N.Y. Bus. Corp. Law §§ 1304, 1309, 1310.
\textsuperscript{127} N.Y. Bus. Corp. Law §§ 304(b), 402(a)(7).
\textsuperscript{128} N.Y. Bus. Corp. Law §§ 304(b), 1304(a)(5).
\textsuperscript{129} N.Y. Bus. Corp. Law § 304(c).
\textsuperscript{130} N.Y. Bus. Corp. Law § 304(d).
There is also an entirely new provision for service of process in certain kinds of proceedings upon the Secretary of State as agent for foreign corporations who are doing business here without having received authority so to do.\textsuperscript{131} The basis for such service is the policy expressed that doing business here constitutes submission to the jurisdiction of the courts of the state, and therefore such a foreign corporation is deemed to have designated the Secretary of State as agent upon whom process against it may be served, "in any action or special proceeding arising out of or in connection with the doing of such business."

Service of process must be made in the Albany office of the Department of State upon the Secretary of State, or upon a deputy Secretary of State, or upon any person authorized by the Secretary to receive such service.\textsuperscript{132} To constitute effective service, further proceedings must be taken to give notice of the institution of the action or proceeding, all of which are set forth in detail in the section of the Business Corporation Law.\textsuperscript{133}

The basis for the authority and procedure for service in such actions is taken from Section 253 of the Vehicle and Traffic Law, and Sections 250 and 352-b of the General Business Law.

Further reference to service of process is worthy of note. If at the time service of process is made upon the Secretary of State, as the designated agent of a domestic or foreign corporation authorized to do business in this state, there is no post office address on file with the Department of State specified for the purpose of transmitting a copy of such process, the Secretary of State shall mail such copy of process, if the defendant is a domestic corporation, in care of any director named in the certificate of incorporation at his address stated therein, or if the defendant is a foreign corporation, copy of process shall be mailed to the corporation at the address of its office within the state on

\textsuperscript{131} N.Y. Bus. Corp. Law § 307.
\textsuperscript{132} N.Y. Bus. Corp. Law § 307(b).
\textsuperscript{133} N.Y. Bus. Corp. Law § 307(b),(c).
file in the Department.\textsuperscript{134} The situation to which this provision would apply is one where the domestic or foreign corporation has filed instruments a long time ago. All domestic and foreign corporations should file instruments promptly with an address which is current so that they will in fact receive notice of the institution of court actions.

And lastly, much trouble is encountered because the Department of State refuses—as it must—to accept service of process in actions instituted in courts of limited jurisdiction against domestic corporations and foreign corporations authorized to do business here because at least one provision of law applicable to such service is completely overlooked. That is, service in such actions can be made on the Secretary of State only if the office of the defendant corporation is within the territorial jurisdiction of the court of limited jurisdiction in which the action has been instituted and the cause of action arose within that jurisdiction.\textsuperscript{135}

These same provisions will continue to be troublesome under the Business Corporation Law unless there is greater awareness of the limitations. Although the Department of State may be unable to determine whether the cause of action arose within the territorial jurisdiction of a particular court of limited jurisdiction, and, therefore, would not reject process on this ground unless the process itself discloses the absence of this limitation, the Department does have the location of the office of the defendant corporation in its records, and when it checks that address, it can determine whether this limitation is or is not applicable, and will act accordingly.

By definition of the word “process,” service on the Secretary of State is limited to actions instituted in the courts of this state and in the federal courts sitting in and for this state.\textsuperscript{136}

\textsuperscript{134} N.Y. BUS. CORP. LAW § 306(b).
\textsuperscript{135} N.Y. BUS. CORP. LAW § 306(c); see N.Y. GEN. CORP. LAW § 217; N.Y. STOCK CORP. LAW § 25.\textsuperscript{136} N.Y. BUS. CORP. LAW § 102(a)(11).
CONCLUSION

This article does not reach into every specific phase of the subject matter upon which comment is made. Common problems and some highlights are discussed. Because of the method adopted in constructing the Business Corporation Law, it will be relatively simple for every practitioner in the field of corporation law to find the statutory provision applicable to any particular problem.

In the area in which the practitioner comes into contact with the Department of State, he will find, as always, a friendly and cooperative spirit, bent on providing assistance, help and guidance.

The policy applicable to the administration of the corporate laws, like the policy in respect of all matters under the jurisdiction of the incumbent Secretary of State, is to serve in the public interest and, whenever appropriately possible, to overcome obstacles rather than to create them.