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# Administrative Aspects of State Corporation Law

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# ARTICLES

## ADMINISTRATIVE ASPECTS OF STATE CORPORATION LAW

*M. Thomas Arnold\**

### I. INTRODUCTION

Modern state corporation statutes are primarily enabling rather than regulatory in nature. In spite of this, there are certain administrative aspects of such statutes with which an attorney practicing in the corporate area must be familiar. This article discusses these administrative aspects of state corporation law.

Following a brief discussion of the powers of the secretary of state,<sup>1</sup> this article examines the filing of corporate documents with the office of the secretary of state. Important issues regarding the filing of documents include: the extent of the secretary of state's power to refuse to file a document, the procedure to be followed should the secretary of state refuse to file a document, the effective date and time of a filed document, and the correction of a filed document.

The next topic discussed is the requirement of filing an annual report with the secretary of state. Significant questions related to this requirement include: the nature of the information

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1. This article refers to the state filing authority as the "secretary of state." Some states call the filing authority by other names. *See, e.g.,* ALASKA STAT. § 10.06.990 (1989) (commissioner of commerce and economic development).

required in the report, the time for filing, the consequences of failing to file, and the procedure for correcting the report.

Part IV of this article considers the office and agent requirements. The issues discussed include: who may act as a registered agent, changing the registered office or agent, changes in the agent's name or address, resignation of the agent, and failure to maintain an office or agent.

The final topic discussed is enforcement of the various statutory requirements. Included in this discussion are: the grounds and procedure for both administrative dissolution and revocation of a certificate of authority, reinstatement after administrative dissolution or revocation of the certificate of authority, and the effect of reinstatement after administrative dissolution.

This article focuses on the Model Business Corporation Act and California, Delaware and New York statutes. Since many state corporation statutes are modeled on either the Model Business Corporation Act or the Delaware statute, an attorney who understands their operation should be able to work with any state corporation statute.

Modern corporation statutes permit the state attorney general to bring an action to involuntarily dissolve or enjoin a corporation that is engaged in ultra vires activity.<sup>2</sup> In most cases it is difficult to find a legitimate state interest in preventing a corporation from engaging in business that is merely ultra vires, as opposed to illegal. If the activity involved is one in which a corporation with a general purpose clause may engage, presumably the public welfare is not harmed by such ultra vires activity. For example, there is no harm to the public welfare where a corporation formed for the purpose of engaging in the retail shoe business also sells flowers.<sup>3</sup> Several older cases establish that a court will not grant an injunction against ultra vires

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2. See CAL. CORP. CODE § 208(a)(1)-(2) (West 1990); DEL CODE ANN. tit. 8, § 124(3) (1991); N.Y. BUS. CORP. LAW § 203(3) (McKinney 1986); REV. MODEL BUSINESS CORP. ACT §§ 3.04(b)(3), 14.30 (1984); MODEL BUSINESS CORP. ACT ANN. §§ 7(c), 97(d) (1971).

3. See *Attorney Gen. v. Tudor Ice Co.*, 104 Mass. 239 (1870) (denying injunction where corporation formed for purpose of engaging in ice business engaged in other business; no showing of injury or threat of injury to public or to any private rights).

activity or dissolve a corporation for engaging in such activity unless there is harm or a threat of harm to the public.<sup>4</sup> State attorneys general rarely bring suit against corporations for engaging in ultra vires activity<sup>5</sup> and the topic is not discussed further in this article.

## II. POWERS OF THE SECRETARY OF STATE

The Revised Model Business Corporation Act provides that the secretary of state "has the power reasonably necessary to perform the duties required" of the secretary of state by the Act.<sup>6</sup> Earlier versions of the Model Business Corporation Act are broader and provide that the secretary of state has "the power and authority reasonably necessary to enable him to administer this Act efficiently and to perform the duties"<sup>7</sup> imposed upon the secretary of state by the Act. California, Delaware, and New York do not have comparable statutory provisions.

Under the Revised Model Business Corporation Act, the duty of the secretary of state to file corporate documents is "ministerial" in nature.<sup>8</sup> The secretary of state must file any corporate document that is in the form prescribed and contains the information required by the Act.<sup>9</sup> Examples of documents not entitled to filing include articles of incorporation which set

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4. *Compare* State v. Minnesota Thresher Mfg. Co., 41 N.W. 1020 (Minn. 1889) (dismissing quo warranto action; no public mischief done or threatened) with People v. North River Sugar Refining Co., 24 N.E. 834 (N.Y. 1890) (finding a threat to the public interest by illegal partnership of corporations which dominated sugar industry).

5. See Michael A. Schaeftler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 90-92 (1983) (reporting the results of the author's survey of state attorneys general and departments of state).

6. REV. MODEL BUSINESS CORP. ACT § 1.30 (1984).

7. MODEL BUSINESS CORP. ACT ANN. § 139 (1971); MODEL BUSINESS CORP. ACT ANN. § 132 (1960).

8. REV. MODEL BUSINESS CORP. ACT § 1.25(d) (1984).

9. *Id.* §§ 1.20, 1.25(a); Cf. N.Y. BUS. CORP. LAWS § 104(e) (McKinney 1986) (filing required if document "complies as to form with the requirements of law"); Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973) (per curiam) (stating that the [s]ecretary of [s]tate lacked authority to refuse to file articles of nonprofit corporation where articles complied with formal requirements of statute and stated a lawful purpose).

out a corporate name which is not distinguishable upon the records of the secretary of state<sup>10</sup> or which set out an illegal corporate purpose.<sup>11</sup> The secretary of state may not refuse to file a document because it contains provisions that the secretary of state feels are "irrelevant or not authorized by the Model Act or by general legal principles."<sup>12</sup>

By comparison, older versions of the Model Business Corporation Act and the California statute require the secretary of state to file a corporate document only if the secretary of state finds that it "conforms to law."<sup>13</sup> Where a statute requires the secretary of state to determine whether a document complies with or conforms to the corporation statute (or to the law), the statute may be read to authorize a substantive review of the document by the office of the secretary of state. This review can frustrate an attorney

who, after negotiating a complex provision for inclusion in a proposed articles of incorporation (or other document), is faced with the task of persuading a relatively low-level employee in the office of the secretary of state that the provision is consistent with the secretary of state's view of the meaning of the corporation statute.<sup>14</sup>

Although the secretary of state has no authority under the Revised Model Act to review the substantive validity of provisions in documents, some states which have adopted the Revised Model Act have not accepted its ministerial approach to the secretary of state's filing duty.<sup>15</sup>

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10. See REV. MODEL BUSINESS CORP. ACT § 4.01(b)(1) (1984).

11. See *Smith v. Director, Corp. and Sec. Bureau*, 261 N.W.2d 228, 230-31 (Mich. Ct. App. 1977) (rejecting articles of incorporation where proposed purpose was to make loans at usurious interest rates); REV. MODEL BUSINESS CORP. ACT § 2.02(b)(2)(i) (1984) (explaining that articles of incorporation may set forth a provision not inconsistent with law regarding purpose(s) of corporation).

12. MODEL BUSINESS CORP. ACT ANN. § 1.25 cmt. (Supp. 1993).

13. See, e.g., CAL. CORP. CODE § 110(a) (West 1990); MODEL BUSINESS CORP. ACT ANN. §§ 55 (filing of articles of incorporation), 62 (filing of articles of amendment), 74 (filing of articles of merger, consolidation, or exchange), 93 (filing of articles of dissolution), 111 (filing of application for certificate of authority) (1971).

14. ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS 194-95 (4th ed. 1990).

15. See, e.g., VA. CODE ANN. § 13.1-605(A) (1989) (filing of the document "complies

Under the Revised Model Act, the secretary of state is not empowered to determine the scope of public policy through his or her filing duties.<sup>16</sup> Instead, the attorney general may seek to enjoin illegal corporate conduct or to involuntarily dissolve a corporation whose activities violate public policy.<sup>17</sup> The secretary of state does not consider any conflicting rights of shareholders in determining whether to file a corporate document.<sup>18</sup>

The secretary of state is empowered to collect at the time of filing the requisite filing fees, and any taxes, fees or pertinent penalties required by the corporation statute or other law.<sup>19</sup> The California statute authorizes the secretary of state to grant credit for a portion of the filing fee provided that "the unpaid portion of such fee does not exceed the limits established by the policy of the secretary of state for extending credit in such cases."<sup>20</sup>

The secretary of state has limited power to prescribe mandatory forms and, depending upon the applicable statute, is either permitted or required to prescribe additional forms for documents that may be filed in the office of the secretary of state.<sup>21</sup> In addition, the secretary of state may certify that a document is on file with the office of the secretary of state or, in some states, issue a certified copy of a document on file with the office.<sup>22</sup> The secretary of state often has the power to ad-

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with requirements of law").

16. MODEL BUSINESS CORP. ACT ANN. § 1.30 cmt. (Supp. 1993); *Cf. Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255, 256 (N.Y. 1973) (per curiam) (finding that the secretary of state acted arbitrarily and in excess of authority by refusing to accept articles for nonprofit corporation where formal requirements of the statute were complied with and the corporate purpose set forth was lawful; secretary of state lacked authority to label purposes violative of public policy).

17. MODEL BUSINESS CORP. ACT ANN. § 1.30 cmt. (Supp. 1993); *see also* REV. MODEL BUSINESS CORP. ACT § 14.30(1) (1984).

18. *See Shidler v. All Am. Life & Fin. Corp.*, 775 F.2d 917, 923 (8th Cir. 1985) (permitting private cause of action challenging cash out merger); *Berger v. Amana Society*, 95 N.W.2d 909, 916 (Iowa 1959) (rejecting argument that filing of amendments to articles of incorporation by secretary of state was a defense to cause of action).

19. REV. MODEL BUSINESS CORP. ACT § 1.20(i) (1984); *see also* DEL. CODE. ANN. tit. 8, § 103(c)(2) (1991); N.Y. BUS. CORP. LAW § 104(e) (McKinney 1986).

20. CAL. CORP. CODE § 110(a) (West 1990).

21. *See infra* part III.A.

22. *See infra* part III.G.

ministratively dissolve or revoke the authority of a corporation for noncompliance with specified statutory requirements.<sup>23</sup>

### III. FILING DOCUMENTS

#### A. *Forms*

Under the Revised Model Business Corporation Act, the secretary of state generally has no authority to prescribe forms for mandatory use. However, this statute permits the secretary of state to prescribe mandatory forms in four situations: (1) an application for a certificate of existence; (2) an application by a foreign corporation for a certificate of authority to transact business in the state; (3) an application by a foreign corporation for a certificate of withdrawal; and (4) the annual report to the secretary of state.<sup>24</sup> Each of these situations involves a high volume, routine filing which is most efficiently processed if a uniform form is used.<sup>25</sup> Prior versions of the Model Act and the majority of jurisdictions require the secretary of state to prescribe and furnish mandatory forms for all reports required by the corporation act, which are to be filed in the office of the secretary of state.<sup>26</sup>

The Revised Model Act also provides that the secretary of state may prescribe and furnish forms for other documents; however, the use of such forms is not mandatory.<sup>27</sup> This is a change from prior versions of the Model Business Corporation Act which required the secretary of state to prescribe and furnish forms for all documents that may be filed in the secretary of state's office.<sup>28</sup> The California, Delaware, and New York

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23. See *infra* part VI.

24. REV. MODEL BUSINESS CORP. ACT § 1.21(a) (1984).

25. MODEL BUSINESS CORP. ACT ANN. § 1.21 cmt. (Supp. 1993).

26. See CAL. CORP. CODE § 1502(a) (West 1990) (requiring filing of an annual statement on a form prescribed by the secretary of state); DEL. CODE ANN. tit. 8, § 502(a) (1991) (providing that the annual franchise tax report to the secretary of state "shall be made on a form designated by the [s]ecretary of [s]tate . . ."); MODEL BUSINESS CORP. ACT ANN. § 142 (1971); MODEL BUSINESS CORP. ACT ANN. § 135 (1960); MODEL BUSINESS CORP. ACT ANN. § 1.21 annot. (Supp. 1993).

27. REV. MODEL BUSINESS CORP. ACT § 1.21(b) (1984).

28. See MODEL BUSINESS CORP. ACT ANN. § 142 (1971); MODEL BUSINESS CORP.

statutes do not require the secretary of state to provide forms for optional use. Although not required to do so, the Delaware secretary of state's office does provide such forms. The California secretary of state's office provides, for a small fee, a corporate checklist booklet containing sample forms. The New York Department of State does not provide forms.

## B. *Filing*

The procedure for filing corporate documents under the current Revised Model Business Corporation Act is simple and uniform. First, unlike prior versions of the Model Act, the Revised Model Act centralizes the filing requirements for corporate documents into one section of the statute.<sup>29</sup> Under earlier versions of the Model Act, the filing requirements for each document were set out in the statutory section dealing with that document.<sup>30</sup> Secondly, the Revised Model Business Corporation Act standardizes the filing requirements for all documents required or permitted to be filed with the office of the secretary of state.<sup>31</sup> The Delaware and New York statutes have also centralized and standardized the requirements for corporate documents.<sup>32</sup>

Under the Revised Model Act, only documents which are statutorily required or permitted to be filed are entitled to filing by the secretary of state.<sup>33</sup> A document must contain all information required by the Act and may contain additional information.<sup>34</sup> The document must be typewritten or printed<sup>35</sup> and must be in the English language.<sup>36</sup> The document must

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ACT ANN. § 135 (1960).

29. See REV. MODEL BUSINESS CORP. ACT § 1.20 (1984).

30. See, e.g., MODEL BUSINESS CORP. ACT ANN. §§ 55 (1971) (filing of articles of incorporation), 61-62 (filing of articles of amendment), 74 (filing of articles of merger and consolidation) 92-93 (filing of articles of dissolution).

31. MODEL BUSINESS CORP. ACT ANN. § 1.20(i) cmt. 3 (Supp. 1993).

32. See DEL. CODE ANN. tit. 8, § 103 (1991); N.Y. BUS. CORP. LAW § 104 (McKinney 1986).

33. REV. MODEL BUSINESS CORP. ACT § 1.20(b) (1984).

34. *Id.* § 1.20(c).

35. *Id.* § 1.20(d).

36. *Id.* § 1.20(e). A corporate name for a foreign corporation is not required to be in English if the corporate name is "written in English letters or Arabic or Roman

also be executed by a proper person. Under the Revised Model Business Corporation Act a proper person is: (1) the chairman of the board of directors, the president, or another officer; (2) an incorporator if directors have not been selected; or (3) the receiver, the trustee, or other court-appointed fiduciary for the corporation, if the corporation is in the hands of such a fiduciary.<sup>37</sup> If the secretary of state has prescribed a mandatory form, "the document must be in or on the prescribed form."<sup>38</sup> The document must be accompanied by the correct filing fee and any other tax, fee, or penalty required by the corporation statute or other law,<sup>39</sup> and one exact or conformed copy.<sup>40</sup> "[A]n 'exact' copy is a reproduction of the executed original document by photographic or xerographic process; a 'conformed' copy is a copy on which the existence of signatures is entered or noted on the copy."<sup>41</sup> Thus, unlike older versions of the Model Business Corporation Act,<sup>42</sup> the filing of duplicate originals of a document is no longer required.

The secretary of state endorses a document as "filed," with his or her name and official title, and the date and time received on both the original and exact copy of the document, and on the filing fee receipt.<sup>43</sup> After the document is filed, the document copy and the filing fee receipt are delivered to the corporation or its representative.<sup>44</sup> If no filing fee is required, an acknowledgment receipt is delivered instead of a filing fee receipt.<sup>45</sup> Under the Revised Model Business Corporation Act, the secretary of state is not required to issue any certificates as evidence of acceptance of corporate documents for filing.<sup>46</sup>

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numerals." The certificate of existence for a foreign corporation is not required to be in English if it is "accompanied by a reasonably authenticated English translation." *Id.*

37. *Id.* § 1.20(f).

38. *Id.* § 1.20(h).

39. *Id.* § 1.20(i).

40. *Id.* The exception is a resignation of the registered agent of a corporation, which must be accompanied by two exact or conformed copies of the document. *Id.* §§ 5.03(a), 15.09(a).

41. REV. MODEL BUSINESS CORP. ACT ANN. § 1.20 cmt. 4 (Supp. 1993).

42. See, e.g., MODEL BUSINESS CORP. ACT §§ 55, 62, 74, 93 (1969) (requiring the filing of duplicate originals of corporate documents).

43. REV. MODEL BUSINESS CORP. ACT § 1.25(b) (1984).

44. *Id.*

45. *Id.*

46. MODEL BUSINESS CORP. ACT ANN. § 1.25 cmt. 3 (Supp. 1993). Compare MOD-

Instead, the endorsed filing fee receipt or the acknowledgement of receipt constitutes evidence of the filing of the document with the secretary of state.<sup>47</sup>

The requirements for filing of documents under the Delaware and New York corporation statutes are similar to those set forth in the Revised Model Act, although neither statute requires delivery of a copy of the document.<sup>48</sup> The New York statute expressly requires a document to be in English.<sup>49</sup> Both statutes require the document to be accompanied by all taxes and filing fees that the secretary of state is authorized to collect.<sup>50</sup> The document must be signed by a proper party. In Delaware a proper party is: (1) the incorporators, if the document is filed before the election of the initial board of directors and the certificate of incorporation does not name initial directors;<sup>51</sup> (2) the chairperson or vice-chairperson of the board of directors, the president, or a vice-president, with attestation by the corporate secretary or assistant secretary;<sup>52</sup> (3) a majority of the directors or such directors as are designated by the board, if there are no officers who are authorized by the statute

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EL BUSINESS CORP. ACT § 55(c) (1969) *with* MODEL BUSINESS CORP. ACT § 49(3) (1960) (requiring secretary of state to issue certificate of incorporation); *Compare* MODEL BUSINESS CORP. ACT § 62(c) (1969) *with* MODEL BUSINESS CORP. ACT § 57(3) (1960) (requiring secretary of state to issue certificate of amendment); *Compare* MODEL BUSINESS CORP. ACT § 74(c)(3) (1969) *with* MODEL BUSINESS CORP. ACT § 68(c)(3) (1960) (requiring secretary of state to issue certificate of merger or certificate of consolidation); *Compare* MODEL BUSINESS CORP. ACT § 93(c) (1969) *with* MODEL BUSINESS CORP. ACT § 86(3) (1960) (requiring secretary of state to issue certificate of dissolution).

47. REV. MODEL BUSINESS CORP. ACT ANN. § 1.25 cmt. 3 (Supp. 1993). Under the Revised Model Act anyone may apply to the secretary of state for a certificate of existence for a domestic corporation, or a certificate of authorization for a foreign corporation. REV. MODEL BUSINESS CORP. ACT § 1.28(a) (1984). *See also infra* part III. G.

48. DEL. CODE. ANN. tit. 8, § 103(c)(1)(1991) ("original signed instrument"); N.Y. BUS. CORP. LAW § 104 (McKinney 1986) ("instrument").

49. N.Y. BUS. CORP. LAW § 104(a) (McKinney 1986). A corporate name may be in another language if it is written in English letters or characters. *Id.*

50. DEL. CODE. ANN. tit. 8, § 103(c)(2) (1991); N.Y. BUS. CORP. LAW § 104(e) (McKinney 1986).

51. DEL. CODE. ANN. tit. 8, § 103(a)(1) (1991).

52. *Id.* § 1.03(a)(2)(a). Officers authorized to perform the functions ordinarily performed by the president, a vice-president, secretary, or assistant secretary may sign or attest the document. *Id.*

to sign;<sup>53</sup> (4) by the holders of record of a majority of the outstanding shares of the corporation or such holders of record as are designated by them if there are no officers or directors authorized by the statute to sign;<sup>54</sup> or (5) the holders of record of all outstanding corporate shares.<sup>55</sup> Under the New York statute, the parties authorized to sign a document are substantially the same as in Delaware except that in New York, the vice-chairperson of the board is not authorized to sign.<sup>56</sup> In New York, a subscriber for shares whose subscription is accepted may sign if there is no shareholder of record.<sup>57</sup> Under both statutes where a statutory provision requires acknowledgment of a document, the requirement may be met by either a formal acknowledgment by the person or one of the persons signing, or by the signature of such person which, in New York, must be affirmed as true under penalties of perjury.<sup>58</sup>

Unlike the Revised Model Business Corporation Act, both the Delaware and the New York statutes require local filing or recording of documents filed with the secretary of state. In Delaware, the secretary of state certifies that a document is filed by endorsing "filed" and the date and hour of filing upon the original.<sup>59</sup> The secretary of state then transmits a copy of the document to the office of the recorder of the county in which the corporation's registered office is located.<sup>60</sup> Similarly, in New York, the secretary of state makes, certifies, and transmits a copy of the filed document to the clerk of the county in which the office of the corporation is located.<sup>61</sup>

While most corporation statutes do not have provisions pertaining to filing documents by telefacsimile, it is likely that many corporation statutes will soon be amended to permit such filings.<sup>62</sup>

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53. *Id.* § 103(a)(2)(b).

54. *Id.* § 103(a)(2)(c).

55. *Id.* § 103(a)(2)(d).

56. *See* N.Y. BUS. CORP. LAW § 104(d) (McKinney 1986).

57. *Id.*

58. DEL. CODE ANN. tit. 8, § 103(b)(1), (2) (1991); N.Y. BUS. CORP. LAW § 104(d) (McKinney 1986) (applies to a document required to be verified or acknowledged).

59. DEL. CODE ANN. tit. 8, § 103(c)(3) (1991).

60. *Id.* § 103(c)(4)-(5) (Supp. 1992).

61. N.Y. BUS. CORP. LAW § 104(g) (McKinney 1986).

62. *See, e.g.,* KAN. STAT. ANN. § 17-6003(a) (Supp. 1992) (permitting filing by

### C. *Effective Date and Time*

The effective date of a document accepted for filing by the secretary of state is generally the date and time on which it is filed, and not the date it is reviewed and accepted for filing.<sup>63</sup> Thus, processing time is generally ignored and a document is effective as of the time it is filed "even though it may not be reviewed and accepted for filing until several days later."<sup>64</sup> Under the Revised Model Business Corporation Act, a document which specifies an effective time on the date of filing is effective at that time.<sup>65</sup>

Under the Revised Model Act and the California and Delaware statutes, a document may specify a delayed effective date and time not later than ninety days after the filing of the document.<sup>66</sup> In such a case the document is effective on the delayed effective date at the time specified in the document or, if no time is specified, at the close of business on the delayed effective date.<sup>67</sup>

Under the California statute, a document filed with a delayed effective date may be canceled prior to the time at which it becomes effective.<sup>68</sup>

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telefacsimile; original document must be filed within seven days after telefacsimile filing); N.J. STAT. ANN. § 14A:1-10 (Supp. 1992) (authorizing secretary of state to accept facsimile documents for filing).

63. DEL. CODE ANN. tit. 8, § 103(d) (Supp. 1992) (filing date); N.Y. BUS. CORP. LAW § 104(f) (McKinney 1986) (upon filing); REV. MODEL BUSINESS CORP. ACT § 1.23(a)(1) (1984). The date and time of filing is evidenced by the secretary of state's date and time stamp on the original of the document. REV. MODEL BUSINESS CORP. ACT §§ 1.23(a)(1), 1.25(b) (1984).

64. MODEL BUSINESS CORP. ACT ANN. § 1.23 cmt. (Supp. 1993) (discussing practices of most secretaries of state).

65. REV. MODEL BUSINESS CORP. ACT § 1.23(a)(2) (1984).

66. CAL. CORP. CODE § 110(c) (West 1990); DEL. CODE ANN. tit. 8, § 103(d) (Supp. 1992); REV. MODEL BUSINESS CORP. ACT § 1.23(b) (1984). The New York statute permits specified documents to include a provision establishing a delayed effective date. *See, e.g.*, N.Y. BUS. CORP. LAW §§ 403 (McKinney Supp. 1993) (articles of incorporation), 904(a)(2) (McKinney 1986) (merger or consolidation), 913(d)(2) (McKinney Supp. 1993) (share exchange). *See also* MODEL BUSINESS CORP. ACT ANN. §§ 63, 76 (Supp. 1977) (articles of amendment or plan of merger, consolidation, or exchange may provide for an effective date no later than 30 days after filing).

67. REV. MODEL BUSINESS CORP. ACT § 1.23(b) (1984).

68. CAL. CORP. CODE § 110(c) (West 1990).

#### D. *Refusal to File Documents*

Under the Revised Model Business Corporation Act, the secretary of state's filing duty is ministerial<sup>69</sup> and, thus, the secretary of state's authority to refuse to file documents is very narrow. In addition, the filing of, or refusal to file, a document by the secretary of state does not affect the validity of the document, have any relation to the accuracy of the information contained in the document, or create a presumption regarding the validity of the document or the accuracy of the information contained therein.<sup>70</sup> For these reasons, "it is probable that rejection of documents for filing will occur only rarely."<sup>71</sup>

If the secretary of state refuses to file a document, the Revised Model Business Corporation Act requires the secretary of state to return the document to the corporation or its representative within five days of its delivery. A brief written explanation of the reason for the refusal to file the document must accompany the returned document.<sup>72</sup> The corporation may appeal the refusal to file a document by commencing a petition to compel filing.<sup>73</sup> A state adopting the Revised Model Act must specify the appropriate court in its statute.<sup>74</sup> The court may summarily order the secretary of state to file the document or may take such other action as it deems appropriate.<sup>75</sup> The final action of the court is appealable in the same manner as in other civil cases.<sup>76</sup>

The California corporation statute also contemplates that the secretary of state will return a document to the party submitting it if the secretary of state determines that it does not conform to law.<sup>77</sup> The statute provides a procedure for resubmis-

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69. *See supra* part II.

70. REV. MODEL BUSINESS CORP. ACT § 1.25(d) (1984).

71. MODEL BUSINESS CORP. ACT ANN. § 1.25 cmt. 4 (Supp. 1993).

72. REV. MODEL BUSINESS CORP. ACT § 1.25(c) (1984).

73. *Id.* § 1.26(a). A copy of the document and the secretary of state's refusal to file must be attached to the petition. *Id.*

74. *See id.*

75. *Id.* § 1.26(b).

76. *Id.* § 1.26(c).

77. CAL. CORP. CODE § 110(b) (West 1990).

sion of the document accompanied by a written opinion of a member of the California State Bar who is submitting the document or represents the person submitting it.<sup>78</sup> The opinion must advocate that the specific provision found objectionable by the secretary of state conforms to the law. The opinion must state the "points and authorities upon which the opinion is based."<sup>79</sup> If this procedure is followed, the secretary of state is required to rely on the opinion for any disputed points of law.<sup>80</sup>

A substantial number of states follow the pattern of earlier versions of the Model Business Corporation Act and provide for de novo judicial review of a refusal by the secretary of state to file a corporate document.<sup>81</sup> These statutes provide that final actions of the trial court are appealable in the same manner as in other civil cases.<sup>82</sup> The Delaware and New York corporation statutes do not contain formal procedures for appealing a refusal by the secretary of state to file a document or for resubmission of a document which the secretary of state refuses to file. In Delaware, a mandamus proceeding may be brought to compel the secretary of state to accept a document for filing.<sup>83</sup> In New York, an Article 78 proceeding may be brought for the same purpose.<sup>84</sup> Where the document complies with statutory requirements for filing, a court may compel the secretary of state to accept the document.<sup>85</sup>

In some states, the secretary of state's office will pre-clear a document prior to filing, either on a formal basis for a fee or on

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78. *Id.*

79. *Id.*

80. *Id.* The secretary of state is not required to rely on the opinion with respect to a corporate name. *See id.* §§ 201, 2101, 2106.

81. *See* MODEL BUSINESS CORP. ACT ANN. § 140 (1971); MODEL BUSINESS CORP. ACT ANN. § 133 (1960); *see also* MODEL BUSINESS CORP. ACT ANN. § 1.26 annot. (Supp. 1993) (discussing changes in Model Act's provisions).

82. MODEL BUSINESS CORP. ACT § 140 (1969).

83. *See* DEL. CODE ANN. tit. 10, § 564 (1975).

84. *See* N.Y. CIV. PRAC. L. & R. 7801 (McKinney 1981).

85. *See, e.g.,* Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973) (*per curiam*) (holding that articles of incorporation of a non-profit corporation are entitled to filing). *Cf. McCann v. Jordan*, 24 P.2d 457, 458 (Cal. 1933) (*per curiam*) (holding that document not accompanied by a statutorily required filing fee is not entitled to filing).

an informal basis as a courtesy.<sup>86</sup> Where available, pre-clearance of a document reduces the risk that the document will be rejected for filing.<sup>87</sup>

### E. *False Statement in Documents*

The Revised Model Business Corporation Act makes it a criminal offense to sign a document knowing it "is false in any material respect with intent that the document be delivered to the secretary of state for filing."<sup>88</sup> The offense is complete when the document is signed and does not require actual filing.<sup>89</sup>

The Delaware and New York corporation statutes provide that where the statute requires the document to be acknowledged, the acknowledgement is made under penalty of perjury.<sup>90</sup> In addition, in Delaware, any officer or director of a corporation who knowingly makes a false statement in a franchise tax report to the secretary of state is guilty of perjury.<sup>91</sup>

The California corporation statute imposes joint and several liability upon corporate officers, directors, employees, and agents who knowingly participate in making, issuing, delivering or publishing a corporate document that is materially false.<sup>92</sup> The liability extends to any person who is injured as a result of reliance on the document.<sup>93</sup>

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86. Stephen M. Proctor & John Linnihan, *How to File Corporate Documents in Foreign Jurisdictions*, PRAC. LAW., March 1990, at 17, 21-22.

87. *See id.* at 21.

88. REV. MODEL BUSINESS CORP. ACT § 1.29(a) (1984). The Act provides that the offense is a misdemeanor. *Id.* § 1.29(b). *See also* MODEL BUSINESS CORP. ACT § 136 (1969); MODEL BUSINESS CORP. ACT § 129 (1960) (providing that failure to answer fully and truthfully interrogatories propounded by the secretary of state or signing a false document will result in a misdemeanor).

89. *See* MODEL BUSINESS CORP. ACT ANN. § 1.29 annot. (Supp. 1993).

90. DEL CODE ANN. tit. 8, § 103(b)(2) (1991); N.Y. BUS. CORP. LAW § 104(d) (McKinney 1986).

91. DEL. CODE ANN. tit. 8, § 502(b) (1991).

92. CAL. CORP. CODE § 1507 (West 1990).

93. *Id.*

## F. *Correction of Filed Documents*

Documents filed with the secretary of state generally may be corrected. Under the Revised Model Business Corporation Act, a corporation may correct any document that either contains a false statement or is "defectively executed, attested, sealed, verified, or acknowledged."<sup>94</sup> The document is corrected by delivery of articles of correction to the secretary of state which: (1) describe the document being corrected or have a copy of the document attached; (2) specify either the defect in the execution of the document or the incorrect statement and the reason it is incorrect, and (3) correct the incorrect statement or defective execution.<sup>95</sup> The articles of correction are effective on the original document's effective date, except as to persons who relied on the uncorrected document.<sup>96</sup> As to these persons, the articles of correction are effective when filed.<sup>97</sup>

The California, Delaware, and New York corporation statutes also permit the correction of documents filed with the secretary of state.<sup>98</sup> The procedure for correction of a document under these statutes is similar to the procedure prescribed in the Revised Model Act.<sup>99</sup> With limited exceptions, the effective date of the original document remains the effective date of the corrected document.<sup>100</sup> The California statute provides that no

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94. REV. MODEL BUSINESS CORP. ACT § 1.24(a) (1984).

95. *Id.* § 1.24(b).

96. *Id.* § 1.24(c).

97. *Id.*

98. CAL. CORP. CODE § 109 (West 1990); DEL. CODE ANN. tit. 8, § 103(f) (1991); N.Y. BUS. CORP. LAW § 105 (McKinney Supp. 1993). Each statute calls for the filing of a "certificate of correction."

99. *See supra* notes 94-97. Under each of the state statutes, the certificate of correction must meet the requirements of the statute for filing a document of the type being corrected. *See* CAL. CORP. CODE § 109 (West 1990); DEL. CODE ANN. tit. 8, § 103(f) (1991); N.Y. BUS. CORP. LAW § 105 (McKinney Supp. 1993); *see also supra* part III.B.

100. CAL. CORP. CODE § 109 (West 1990) (extinguishing all rights and liabilities resulting from the error "if the person having that right has not detrimentally relied on the original instrument"); DEL. CODE ANN. tit. 8, § 103(f) (1991) (altering the effective date for "persons who are substantially and adversely affected by the correction"); N.Y. BUS. CORP. LAW § 105 (McKinney Supp. 1993) (stating that a correction "shall not affect any right or liability accrued or incurred before such filing").

correction "shall alter the wording of any resolution . . . which was in fact adopted by the board or the shareholders or effect a corrected amendment of articles which amendment as so corrected would not in all respects have complied with"<sup>101</sup> the corporation statute at the time the original document was filed. The New York statute provides that a corporate name may not be changed or corrected by filing a certificate of correction.<sup>102</sup>

### G. *Certificates and Certified Documents*

Under the Revised Model Business Corporation Act, the secretary of state may certify that a document is on file with his or her office.<sup>103</sup> The issuance of a certificate that is signed by the secretary of state, bears the seal of the state, and is attached to a copy of a document, is conclusive evidence that the document is on file.<sup>104</sup> Unlike earlier versions of the Model Business Corporation Act, the certification of a document by the secretary of state is not prima facie evidence of any facts stated in the document.<sup>105</sup> The limited authority of the secretary of state to refuse to file a document under the Revised Model Act justifies the limited effect given to the secretary of state's certification.<sup>106</sup>

In Delaware, a copy of the certificate of incorporation<sup>107</sup> or of any other corporate document that is certified by the secretary of state and accompanied by a certificate from the appropriate county recorder is prima facie evidence of the due execution, filing, and recording of the document, of performance of all conditions precedent to its effectiveness and of any facts stated in the document.<sup>108</sup> Similarly, the New York statute provides that any document filed with the department of state is prima

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101. CAL. CORP. CODE § 109 (West 1990).

102. N.Y. BUS. CORP. LAW § 105 (McKinney Supp. 1993).

103. See REV. MODEL BUSINESS CORP. ACT § 1.27 (1984).

104. *Id.* The signature may be in facsimile. *Id.*

105. See MODEL BUSINESS CORP. ACT ANN. § 141 (1971); MODEL BUSINESS CORP. ACT ANN. § 134 (1960).

106. See MODEL BUSINESS CORP. ACT ANN. § 1.27 cmt. (Supp. 1993); see also *supra* part II.

107. DEL. CODE ANN. tit. 8, § 104 (1991) (defining "certificate of incorporation").

108. *Id.* § 105.

facie evidence of facts required or permitted by law to be in the document and of the execution of the document.<sup>109</sup> Under the California statute, a copy of a corporation's articles of incorporation certified by the secretary of state is "conclusive evidence of the formation of the corporation and prima facie evidence of its corporate existence"<sup>110</sup> for all purposes other than a quo warranto type action.

Earlier versions of the Model Act require the secretary of state to issue a certificate of incorporation upon the filing of articles of incorporation.<sup>111</sup> The issuance of this certificate is conclusive evidence of incorporation under these Acts except as against the state "in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation."<sup>112</sup> Under the Revised Model Business Corporation Act, the secretary of state no longer issues certificates of incorporation.<sup>113</sup> Instead, anyone may apply to the secretary of state for a certificate of existence of a corporation.<sup>114</sup> Although subject to any qualification stated on the certificate, the issuance of such a certificate by the secretary of state is "conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business" in the state.<sup>115</sup>

#### IV. ANNUAL REPORT

##### A. *The Requirement*

All jurisdictions require regular reporting by all domestic and foreign corporations authorized to transact business within the

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109. N.Y. BUS. CORP. LAW § 106(a) (McKinney 1986).

110. CAL. CORP. CODE § 209 (West 1990).

111. See MODEL BUSINESS CORP. ACT ANN. § 55(c) (1971); MODEL BUSINESS CORP. ACT ANN. § 49(3) (1960).

112. MODEL BUSINESS CORP. ACT ANN. § 56 (1971); MODEL BUSINESS CORP. ACT ANN. § 50 (1960).

113. See MODEL BUSINESS CORP. ACT ANN. § 1.25 cmt. 4 (Supp. 1993). Under the Act, the filing fee receipt or the acknowledgment of receipt is evidence of the filing of the articles of incorporation or any other document by the secretary of state. *Id.*

114. REV. MODEL BUSINESS CORP. ACT § 1.28(a) (1984).

115. *Id.* § 1.28(c).

state.<sup>116</sup> The Revised Model Business Corporation Act requires every domestic and foreign corporation authorized to do business in the state to file an annual report with the secretary of state.<sup>117</sup> California and Delaware also require the filing of an annual report with the secretary of state,<sup>118</sup> although California permits the filing of an abbreviated report where none of the facts or information required to be disclosed has changed since the previous report.<sup>119</sup> New York requires the filing of a statement with its department of state *annually* during the period starting on April 1, 1992 and ending on March 31, 1994, and *triennially* after that period.<sup>120</sup> New York also requires the filing of an annual report with the state tax commission.<sup>121</sup>

The purpose of the requirement in the Revised Model Act that a corporation file an annual report is to provide the secretary of state, members of the public, and shareholders with access to basic information about the corporation.<sup>122</sup> The information may be valuable in communicating with the corporation or in ascertaining alternatives to service of process on the registered agent.<sup>123</sup> Because the purpose of the annual report is to provide information upon which persons dealing with the corporation can rely, a corporation may be estopped from denying the truth of information in its annual report.<sup>124</sup> The reporting requirement under some state tax laws is intended to aid in the administration and enforcement of state tax laws and the reports may not be available for public inspection.<sup>125</sup>

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116. MODEL BUSINESS CORP. ACT ANN. § 16.22 annot. (Supp. 1993).

117. REV. MODEL BUSINESS CORP. ACT § 16.22 (1984).

118. CAL. CORP. CODE §§ 1502(a), 2117(a) (West 1990); DEL. CODE ANN. tit. 8, §§ 374 (governing foreign corporations), 502(a) (concerning annual franchise tax reports) (1991).

119. CAL. CORP. CODE §§ 1502(c), 2117(e) (West 1990).

120. N.Y. BUS. CORP. LAW § 408(3) (McKinney Supp. 1993).

121. N.Y. TAX LAW § 211 (McKinney Supp. 1993).

122. See *Bremer v. Equitable Constr. & Mortgage Corp.*, 191 N.W.2d 331, 333 (Mich. 1971) ("means of furnishing information to those who deal with a corporation").

123. MODEL BUSINESS CORP. ACT ANN. § 16.22 cmt. (Supp. 1993).

124. See *Gorman v. A. B. Leach & Co.*, 11 F.2d 454, 459 (E.D. N.Y. 1926) (holding that a corporation must be estopped from denying its residence as reported in its annual report if it violated a statutory provision requiring it to file a certificate whenever it changes the location of its principal office within the state).

125. See N.Y. TAX LAW § 211(8) (McKinney Supp. 1993).

### B. *Required Information*

The Revised Model Business Corporation Act requires an annual report to the secretary of state to include:

- (1) the name of the corporation and the state or country under whose laws it is incorporated;
- (2) the name of its registered agent and the address of its registered office in the state;
- (3) the address of its principal office;<sup>126</sup>
- (4) the names and business addresses of the principal officers and the directors;<sup>127</sup>
- (5) a brief description of the nature of the corporation's business;
- (6) the total number of authorized shares of each class and series of share; and
- (7) the total number of issued and outstanding shares of each class and series.<sup>128</sup>

The California corporation statute requires similar information.<sup>129</sup> Thus, the report must include: (1) the names and business or residence addresses of the corporation's directors, chief executive officer, secretary, and chief financial officer; (2) the street address of its principal executive office; (3) a statement of the general type of business which is its principal business activity; and (4) the designation of its agent for service of process.<sup>130</sup> The California corporation statute does not require

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126. The principal office address is defined by the Act as "the office (in or out of this state) . . . where the principal executive offices . . . are located." REV. MODEL BUSINESS CORP. ACT § 1.40(17) (1984).

127. The required disclosure of the residential addresses of the principal officers and directors is undesirable, particularly for publicly held corporations. Such disclosure would provide the addresses of wealthy individuals who might prefer that the public not know where they reside.

128. REV. MODEL BUSINESS CORP. ACT § 16.22 (1984).

129. See CAL. CORP. CODE §§ 1502, 2117 (West 1990).

130. *Id.* §§ 1502(a)-(b), 2117(a)-(b). If a foreign corporation uses different titles for its officers than those listed in the statute, the report must include the officers performing comparable duties under different titles. If it has no officers or no natural

annual disclosure of the number of authorized shares or the number of issued and outstanding shares. It does, however, require disclosure of the number of vacancies on the board of directors and, if the principal executive office of the corporation is not in California, the street address of the corporation's principal business office in California, assuming it has such an office.<sup>131</sup> Where there is no change of information from the last report filed, a corporation may simply advise the secretary of state, on a prescribed form, that no changes have occurred.<sup>132</sup>

In Delaware, the annual franchise tax report to the secretary of state must disclose information similar to that required by the California and Revised Model Acts. The tax report must include the name of the corporation's registered agent, the location of its registered office in Delaware, and the names and addresses of all the directors and officers of the corporation.<sup>133</sup> In addition, it must report: (1) when the terms of each of the directors and officers expire; (2) the date appointed for the next annual shareholder meeting; (3) the corporation's principal place of business outside of Delaware; (4) the number of shares of each class of par value shares and no par value shares which the corporation is authorized to issue and the number actually issued; and (5) where the corporation is exempt from taxation, a statement of the facts entitling the corporation to such exemption.<sup>134</sup>

In New York, the statement filed with the department of state must set forth: (1) the name and business address of the chairman of the corporation's board of directors; (2) the street address of the corporation's principal executive office; and (3) the post office address to which the secretary of state can mail a copy of service of process against the corporation.<sup>135</sup> The report required by state tax law is filed with the state tax

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persons who are officers, the report must include the names of the natural persons performing comparable duties for the corporation. *Id.* § 2117(a).

131. *Id.* §§ 1502(a), 2117(a).

132. *Id.* §§ 1502(c), 2117(e).

133. DEL. CODE ANN. tit. 8, § 502(a) (1991); see also *id.* § 374 (foreign corporations).

134. DEL. CODE ANN. tit. 8, § 502(a) (1991); see also *id.* § 374 (foreign corporations).

135. N.Y. BUS. CORP. LAW § 408(1) (McKinney Supp. 1993).

commission and must set forth the information which the tax commission prescribes.<sup>136</sup>

### C. *Time for Filing*

The Revised Model Business Corporation Act requires delivery of the annual report to the secretary of state between January 1 and April 1 of each year, beginning with the year following the calendar year in which the corporation is incorporated or is authorized to transact business in the state.<sup>137</sup> In Delaware, the annual franchise tax report of a domestic corporation must be filed with the secretary of state on or before March 1 of each year,<sup>138</sup> while the annual report of a foreign corporation is due on or before June 30 of each year.<sup>139</sup>

In California, each corporation has its own filing period during which the annual report to the secretary of state must be presented. The initial report is due within ninety days of the filing of the original articles of incorporation<sup>140</sup> or application for authority to do business in the state.<sup>141</sup> Thereafter, the annual report must be filed during the month in which the original articles of incorporation or application for authority to transact business in California, is filed, or within the five months immediately preceding.<sup>142</sup> A corporation may file an updated report whenever there is a change in any of the information required to be disclosed in the annual report.<sup>143</sup> A report must be filed for a corporation to change its agent, or its agent's address, for service of process.<sup>144</sup>

In New York, each corporation has its own filing period for the annual statement. The statement is due the calendar month

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136. N.Y. TAX LAW § 211(1) (McKinney Supp. 1993).

137. REV. MODEL BUSINESS CORP. ACT § 16.22(c) (1984). Cf. MODEL BUSINESS CORP. ACT § 126 (1969); MODEL BUSINESS CORP. ACT § 119 (1960) (requiring delivery of report between January 1 and March 1).

138. DEL. CODE ANN. tit. 8, § 502(a) (1991).

139. *Id.* § 374.

140. CAL. CORP. CODE § 1502(a) (West 1990).

141. *Id.* §§ 2105, 2117(e).

142. *Id.* §§ 1502(d), 2117(e).

143. *Id.* §§ 1502(e), 2117(e).

144. *Id.*

in which the corporation's original articles of incorporation or application for authority to transact business was filed or became effective.<sup>145</sup> A corporation must file the annual report with the state tax commission on or before March 15. If the corporation reports on the basis of a fiscal year, the report must be filed within two and one-half months after the close of its fiscal year.<sup>146</sup>

#### D. *Forms*

The Revised Model Business Corporation Act provides that the secretary of state *may* prescribe and furnish forms for the filing of the annual report.<sup>147</sup> Earlier versions of the Model Business Corporation Act, as well as the California corporation statute, require that corporations make the annual report on a form prescribed by the secretary of state.<sup>148</sup>

Both Delaware and New York require corporations to make the annual franchise tax report on a form designated by the secretary of state.<sup>149</sup> New York also requires that the annual report to the state tax commission be on a form prescribed by the commission.<sup>150</sup>

#### E. *Failure to File*

Sanctions for failure to file required annual reports may include administrative dissolution, revocation of authority to transact business in the state, and monetary penalties. Filing an annual report with substantial errors "is tantamount to no filing" since it frustrates the very purpose of the annual report requirement.<sup>151</sup> Under the Revised Model Business

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145. N.Y. BUS. CORP. LAW § 408(3) (McKinney Supp. 1993). After March 31, 1994, the corporation is only required to file the statement triennially. *Id.*

146. N.Y. TAX LAW § 211(1) (McKinney Supp. 1993).

147. REV. MODEL BUSINESS CORP. ACT § 1.21(a) (1984); *see also supra* part III.A.

148. *See* CAL. CORP. CODE §§ 1502(a), (c), 2117(a), (e) (West 1990); MODEL BUSINESS CORP. ACT §§ 125, 142 (1969); MODEL BUSINESS CORP. ACT §§ 118, 135 (1960).

149. DEL. CODE ANN. tit. 8, § 502(a) (1991); N.Y. BUS. CORP. LAW § 408(2) (McKinney Supp. 1993).

150. N.Y. TAX LAW § 211(1) (McKinney Supp. 1993).

151. *Bremer v. Equitable Constr. & Mortgage Corp.*, 191 N.W.2d 331, 333-34

Corporation Act, the secretary of state may commence an administrative proceeding to dissolve a domestic corporation that fails to file its annual report within sixty days after it is due.<sup>152</sup> Similarly, the secretary of state may commence an administrative proceeding to revoke the certificate of authority to transact business in the state when a foreign corporation fails to file its annual report within sixty days after it is due.<sup>153</sup> Earlier versions of the Model Business Corporation Act do not authorize administrative dissolution by the secretary of state for failure to file an annual report. Instead, the state attorney general is authorized to bring an action for judicial dissolution.<sup>154</sup>

California's corporation statute directs the secretary of state to mail a notice of delinquency to a corporation that fails to file its annual report.<sup>155</sup> If the annual statement is not filed within sixty days after the notice is mailed, the secretary of state must certify the name of the corporation to the franchise tax board for the assessment of a penalty.<sup>156</sup> Failure to file the annual report for two consecutive years subjects a domestic corporation to the suspension of its corporate powers and a foreign corporation to forfeiture of its authority to transact business in the state.<sup>157</sup>

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(Mich. 1971).

152. REV. MODEL BUSINESS CORP. ACT § 14.20(2) (1984). *See also infra* parts VIA.-B.

153. REV. MODEL BUSINESS CORP. ACT § 15.30(1) (1984). Earlier versions of the Model Business Corporation Act also provide for revocation of the certificate of authority by the secretary of state where a foreign corporation fails to file an annual report when it is due. MODEL BUSINESS CORP. ACT § 121(a) (1969); MODEL BUSINESS CORP. ACT § 114(a) (1960); *see also infra* part VIE-F.

154. MODEL BUSINESS CORP. ACT § 94(a) (1969); MODEL BUSINESS CORP. ACT § 87(a) (1960). Earlier versions of the Model Act also provide for a penalty of ten percent of the franchise tax assessed against a domestic or foreign corporation that fails to file its annual report within the required time period. *See* MODEL BUSINESS CORP. ACT § 135 (1969); MODEL BUSINESS CORP. ACT § 128 (1960).

155. CAL. CORP. CODE § 2204(a) (West 1990).

156. *Id.* The penalty is \$250. CAL. REV. & TAX CODE § 25936 (West 1992). A corporation may request relief from the secretary of state on the grounds of reasonable cause or unusual circumstances justifying the failure to file. CAL. CORP. CODE § 2204 (West 1990).

157. CAL. CORP. CODE §§ 2205(a), 2206(a) (West 1990).

In Delaware, a corporation is subject to a fifty dollar fine for failure to file the annual franchise tax report with the secretary of state on or before March 1.<sup>158</sup> The secretary of state is authorized to investigate the reasons for a corporation's failure to file the report and pay its taxes, and may refer the matter to the state attorney general if he or she believes such action is warranted.<sup>159</sup> Delaware's statute provides that the secretary of state shall terminate the authority of a foreign corporation which fails to file an annual report within any two year period.<sup>160</sup>

In New York, a corporation which fails to file its statement with the department of state for two years is delinquent on the records of the department sixty days after a delinquency notice is mailed to the corporation's last known address.<sup>161</sup> The corporation may have the delinquency removed by filing a current statement and paying a \$250 fine.<sup>162</sup> In addition, the tax commission is required to certify to the secretary of state the names of corporations which fail to file annual franchise tax reports for two consecutive years.<sup>163</sup> The secretary of state then dissolves the domestic corporations<sup>164</sup> and annuls the authority of the foreign corporations to transact business in New York.<sup>165</sup>

#### F. *Correction Period*

The Revised Model Business Corporation Act requires the secretary of state to return the corporation's annual report and to notify a corporation in writing where the report does not include the information required by the Act.<sup>166</sup> The annual

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158. DEL. CODE ANN. tit. 8, § 502(c) (1991).

159. *Id.* § 502(e).

160. *Id.* § 375.

161. N.Y. BUS. CORP. LAW § 409(2) (McKinney Supp. 1993).

162. *Id.* A corporation is shown to be past due on the records of the department of state thirty days after it fails to file the statement with the department. *Id.* § 409(1).

163. N.Y. TAX LAW §§ 203(a) through 203(b) (McKinney 1986).

164. *Id.* § 203(a)(3) to (4).

165. *Id.* § 203(b)(3) to (4).

166. REV. MODEL BUSINESS CORP. ACT § 16.22(d) (1984); *see also id.* § 1.41(e) (specifying when written notice from the secretary of state is effective under the Act).

report is considered to be filed on time if it is corrected and delivered to the secretary of state within thirty days after notice from the secretary of state is effective.<sup>167</sup> The 1969 Model Business Corporation Act also provides a correction period during which the annual report may be corrected without penalty.<sup>168</sup> Similarly, the California corporation statute requires the secretary of state to mail a notice of delinquency to a corporation which does not comply with the annual report requirement and allows a corporation to file the annual report within sixty days after the mailing of the notice without incurring a penalty.<sup>169</sup> The Delaware and New York statutes do not have analogous provisions.

## V. OFFICE AND AGENT REQUIREMENTS

### A. *The Requirement*

The requirement that a corporation maintain both a registered office and a registered agent in the state is designed to ensure that the corporation has an office at which it can be found within the state and that it has an agent upon whom notice or process may be served at that office.<sup>170</sup> This facilitates not only the service of process in litigation, but also the delivery of tax notices and other communications from government officials.<sup>171</sup> The address of the registered office may be obtained from public records maintained by the secretary of state and must be a street address, not merely a post office box.<sup>172</sup> While the registered agent is the corporation's agent for the service of any process, notice, or demand,<sup>173</sup> service of

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167. *Id.* § 16.22(d).

168. *See* MODEL BUSINESS CORP. ACT § 126 (1969) (if corrected within thirty days from the date, the secretary of state's notice is mailed to the corporation).

169. CAL. CORP. CODE § 2204(a) (West 1990).

170. *See* MODEL BUSINESS CORP. ACT ANN. § 5.01 cmt. (Supp. 1993).

171. *Id.*

172. *Id.* *See* DEL. CODE ANN. tit. 8, § 102(a)(2) (1991) (requiring the address of the registered office in certificate of incorporation to include street and number); REV. MODEL BUSINESS CORP. ACT § 2.02(a)(3) (1984) (requiring articles of incorporation to set out street address of initial registered office).

173. *See* REV. MODEL BUSINESS CORP. ACT § 5.04(a) (1984).

process upon the registered agent is not the exclusive manner of serving process on a corporation.<sup>174</sup>

The Revised Model Business Corporation Act requires each corporation to continuously maintain a registered office in the state.<sup>175</sup> Most state corporation statutes<sup>176</sup> and earlier versions of the Model Business Corporation Act have a similar requirement.<sup>177</sup> The Revised Model Business Corporation Act also requires a corporation to continuously maintain a registered agent in the state.<sup>178</sup> California, Delaware, and most of the other state corporation statutes have a similar requirement.<sup>179</sup> The New York corporation statute designates the secretary of state as the agent of a corporation for the service of process,<sup>180</sup> but also permits a corporation to appoint a registered agent.<sup>181</sup>

Generally, the name of a domestic corporation's initial registered agent and the street address of its initial registered office

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174. See, e.g., DEL. CODE ANN. tit. 8, §§ 321, 376 (1991); N.Y. BUS. CORP. LAW § 306(d) (McKinney 1986); REV. MODEL BUSINESS CORP. ACT §§ 5.04(c), 15.10(d) (1984); MODEL BUSINESS CORP. ACT ANN. § 14 (1971); MODEL BUSINESS CORP. ACT ANN. § 13 (1960).

175. REV. MODEL BUSINESS CORP. ACT §§ 5.01(1), 15.07(1) (1984).

176. See, e.g., DEL. CODE ANN. tit. 8, § 131(a) (1991) (requiring a registered office); cf. *id.* § 371(b)(2) (requiring a foreign corporation seeking to be qualified to do business in Delaware to file a statement setting forth the name and address of its registered agent in Delaware).

177. See MODEL BUSINESS CORP. ACT ANN. §§ 12(a), 113(a) (1971); MODEL BUSINESS CORP. ACT ANN. §§ 11(a), 106(a) (1960).

178. REV. MODEL BUSINESS CORP. ACT §§ 5.01(2), 15.07(2) (regarding foreign corporations) (1984). Earlier versions of the Model Business Corporation Act also require a registered agent. See MODEL BUSINESS CORP. ACT ANN. §§ 12(b), 113(b) (1971); MODEL BUSINESS CORP. ACT ANN. §§ 11(b), 106(b) (1960).

179. See CAL. CORP. CODE §§ 1502(b), 2117(b) (West 1990) (requiring designation in annual statement filed with secretary of state); DEL. CODE ANN. tit. 8, § 132(a) (1991). See generally MODEL BUSINESS CORP. ACT ANN. § 5.01 annot. (Supp. 1993).

180. N.Y. BUS. CORP. LAW § 304(a) (McKinney 1986). The articles of incorporation of a domestic corporation or an application for a certificate of authority by a foreign corporation must also designate the secretary of state as the agent of the corporation. *Id.* § 304(b).

181. *Id.* § 305(a). In addition, the New York Civil Practice Law and Rules permit a corporation to designate a person as an agent for service of process by filing a writing with the consent of the agent endorsed on it. The writing must be "executed and acknowledged in the same manner as a deed" and must be filed in the office of the county clerk of the county in which the corporation has its principal office. N.Y. CIV. PRAC. L. & R. 318 (McKinney 1990).

must be set out in the articles of incorporation.<sup>182</sup> In addition, a foreign corporation's application for a certificate of authority to do business within a state must set forth the name of its registered agent and the address of its registered office in the state.<sup>183</sup> Finally, a number of corporation statutes require that a corporation's annual report to the secretary of state include the name of its registered agent and the address of its registered office in the state.<sup>184</sup>

The registered office of a corporation may be the same as its business office, a legal office, or a corporate service company may provide the registered office.<sup>185</sup>

### B. *Who May Act as Agent*

The registered agent may be a state resident, a domestic corporation, or a foreign corporation authorized to transact business in the state.<sup>186</sup> The business office of the registered

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182. See DEL. CODE ANN. tit. 8, § 102(a)(2) (1991); REV. MODEL BUSINESS CORP. ACT § 2.02(a)(3) (1984); MODEL BUSINESS CORP. ACT ANN. § 54(i) (1971); MODEL BUSINESS CORP. ACT ANN. § 48(j) (1960). Cf. CAL. CORP. CODE § 202(c) (West 1990) (stating the name and address of a corporation's initial agent for service of process); N.Y. BUS. CORP. LAW § 402(a)(3), (8) (McKinney 1986) (stating that the certificate of incorporation shall set forth the county in New York in which the office of the corporation is to be located and the name and address of the registered agent if corporation is to have one).

183. See, e.g., DEL. CODE ANN. tit. 8, § 371(b)(2) (1991); REV. MODEL BUSINESS CORP. ACT § 15.03(a)(5) (1984); MODEL BUSINESS CORP. ACT ANN. § 110(e) (1971).

184. See, e.g., CAL. CORP. CODE §§ 1502(b), 2117(b) (West 1990); REV. MODEL BUSINESS CORP. ACT § 16.22(a)(2) (1984); see also *supra* part IV.B. California also requires the annual report to the secretary of state to disclose the street address of the corporation's principal executive office and if the principal executive office is not in California, the street address of any principal business office. CAL. CORP. CODE §§ 1502(a), 2117(a) (West 1990). See also *id.* § 2105 (requiring the same information from a foreign corporation seeking a certificate of qualification to do business in California). New York requires that the articles of incorporation disclose the county within New York in which the office of the corporation is to be located and the post office box either inside or outside of New York to which the secretary of state can mail any process served upon him as agent of the corporation. N.Y. BUS. CORP. LAW § 402(a)(3), (7) (McKinney 1986). These provisions also facilitate service of process or notice on the corporation.

185. See generally MODEL BUSINESS CORP. ACT ANN. § 5.01 cmt. (Supp. 1993); see *infra* part V.B.

186. DEL. CODE ANN. tit. 8, § 132(a) (1991); REV. MODEL BUSINESS CORP. ACT §§ 5.01(2), 15.07(2) (1984); see also CAL. CORP. CODE §§ 1502(b), 1505, 2117(b) (West

agent must be identical to the registered office of the corporation.<sup>187</sup> The Delaware statute expressly permits a corporation to designate itself as its registered agent.<sup>188</sup> The official comments to the Revised Model Act indicate that a corporation may designate a corporate officer as its registered agent.<sup>189</sup> Since many of the communications received by the registered agent concern legal matters, the corporation's attorney or his or her agent is often designated as its registered agent.<sup>190</sup> In addition, a corporate service company will generally serve as registered agent for a modest fee.

The New York corporation statute requires a corporation to designate the secretary of state as its agent for the service of process,<sup>191</sup> but also permits the corporation to appoint a registered agent.<sup>192</sup> The additional agent may be a natural person who is either a resident of or has a business address in New York, a domestic corporation, or a foreign corporation authorized to do business in New York.<sup>193</sup>

Most corporation statutes, including the Revised Model Business Corporation Act and the Delaware and New York statutes, do not require the filing of a consent form by the registered agent at the time of his or her designation as the corporation's agent.<sup>194</sup> The Revised Model Business Corporation Act does,

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1990) (stating an agent may be a natural person residing in California, a domestic corporation, or a foreign corporation authorized to do business in California; if a corporation, it must file a certificate before it can be designated as agent).

187. DEL. CODE ANN. tit. 8, § 132(a) (1991); REV. MODEL BUSINESS CORP. ACT §§ 5.01(2), 15.07(2)(1984) (regarding foreign corporations).

188. DEL. CODE ANN. tit. 8, § 132(a) (1991). Where a corporation designates itself as registered agent, service of process may be made by any method authorized for service on a corporate registered agent or by any method authorized for service upon a corporation. *Keith v. Melvin L. Joseph Constr. Co.*, 451 A.2d 842, 845 (Del. Super. Ct. 1982).

189. MODEL BUSINESS CORP. ACT ANN. § 5.01 cmt. (Supp. 1993).

190. *Id.*

191. N.Y. BUS. CORP. LAW § 304(b) (McKinney 1986).

192. *Id.* § 305(a) (McKinney 1993). In addition, a corporation may designate an agent for service of process under the New York Civil Practice Law and Rules. N.Y. CIV. PRAC. L. & R. 318 (McKinney 1990).

193. N.Y. BUS. CORP. LAW § 305(a) (McKinney 1986).

194. *See* MODEL BUSINESS CORP. ACT ANN. § 5.01 annot. (Supp. 1993) (stating that eight jurisdictions require consent to appointment).

however, require the written consent of the new registered agent where a corporation changes its registered agent.<sup>195</sup>

### C. *Change of Office or of Agent*

The address of a corporation's registered office or the designation of its registered agent may be changed. Service of process on a corporation's prior registered agent is valid until the corporation complies with the statutory procedure for changing its registered agent.<sup>196</sup> Under the Revised Model Business Corporation Act, a corporation may change its registered office or its registered agent by delivery of a statement of change to the secretary of state.<sup>197</sup> The statement must set out: (1) the name of the corporation; (2) the street address of its current registered office and, if the registered office is to be changed, the street address of its new registered office; (3) the name of its current registered agent and, if the registered agent is to be changed, the name of its new registered agent and the consent of the new agent to the appointment; and (4) a statement that, after the change(s), the street address of its registered office will be the same as the street address of its registered agent's business office.<sup>198</sup> The Revised Model Act does not require formal action by the board of directors or amendment of the articles of incorporation in order to change the registered office or registered agent of a corporation.<sup>199</sup> Under the California statute, a corporation may change its agent for service of process by filing a statement which contains the information required to be in the annual report.<sup>200</sup> An amendment of the articles of incorporation or a resolution of the board of directors is not required.

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195. REV. MODEL BUSINESS CORP. ACT §§ 5.02(a)(5), 15.08(a)(5) (1984).

196. *See* *Rever v. Lapidus*, 151 So.2d 61 (Fla. Dist. Ct. App. 1963) (holding that service of process on an agent was sufficient although the agent filed an affidavit stating that he no longer had contact with the corporation).

197. REV. MODEL BUSINESS CORP. ACT §§ 5.02(a), 15.08(a) (1984).

198. *Id.*

199. MODEL BUSINESS CORP. ACT ANN. § 5.02 cmt. (Supp. 1993).

200. CAL. CORP. CODE §§ 1502(e), 2117(d) (West 1990). A corporation designated as statutory agent may notify the secretary of state of a change of address by filing a certificate. *See id.* § 1505(b).

The Delaware statute requires a resolution of the board of directors in order for a domestic corporation to change the location of its registered office or to change its registered agent, although it does not require amendment of the articles of incorporation.<sup>201</sup> A certificate regarding the change must be executed, acknowledged, and filed with the secretary of state.<sup>202</sup> In addition, a certified copy must be recorded in the office of the recorder for the county in which the new office is located, and in the office of the recorder for the county in which the former office was located if different from the county in which the new office is located.<sup>203</sup> A foreign corporation authorized to transact business in Delaware may change its registered agent by filing with the secretary of state an acknowledgment document which includes the name and address of its registered agent and a revocation of all previous designations of a registered agent.<sup>204</sup>

Under the New York statute, a domestic corporation must amend its articles of incorporation to change the post office address to which the secretary of state mails service of process served upon him or her as agent of the corporation.<sup>205</sup> In addition, the articles of incorporation must be amended in order to "make, revoke or change the designation of a registered agent."<sup>206</sup> The New York statute permits the articles of incorporation to be amended in these situations by vote of the board of directors.<sup>207</sup> A foreign corporation authorized to transact business in New York may make any of the changes discussed above by filing a certificate of change of application for authority with the department of state.<sup>208</sup>

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201. DEL. CODE ANN. tit. 8, § 133 (1991).

202. *Id.* See generally *supra* part III.B. (discussing the filing of documents).

203. DEL. CODE ANN. tit. 8, § 133 (1991).

204. *Id.* § 377(a).

205. N.Y. BUS. CORP. LAW § 801(b)(4) (McKinney 1986).

206. *Id.* § 801(b)(5). The designation of an agent for service of process under the New York Civil Practice Law and Rules may be revoked by filing a revocation in the office of the county clerk of the county in which the corporation has its principal office. See N.Y. CIV. PRAC. L. & R. 318 (McKinney 1990).

207. N.Y. BUS. CORP. LAW § 803(b) (McKinney 1986).

208. *Id.* § 1309-A.

#### D. *Change in Address or Name of Agent*

When a corporation service company changes its offices or changes its name, the task of properly notifying the secretary of state of the changes in all of the registered offices that it provides can be monumental. Absent a statutory provision to simplify the procedure, the corporation service company must obtain the signatures of hundreds or even thousands of customers.

Under the Revised Model Business Corporation Act, a registered agent who changes the street address of his or her business office may change the street address of the registered office of any corporation for which he or she acts as registered agent by notifying the corporation in writing of the change and signing and delivering to the secretary of state a statement of change.<sup>209</sup> The statement must contain the required information as well as a recital that the corporation is notified of the change.<sup>210</sup> The signature may be either manual or in facsimile, which eases the burden on a corporation service company which may be required to file thousands of statements of change when it changes the street address of its business office.<sup>211</sup>

Delaware has a similar provision applying both to address changes by registered agents and to name changes by registered agents.<sup>212</sup> Under this provision, the registered agent may change the address of the registered offices of all corporations for which the agent is a registered agent by executing, acknowledging, and filing a single certificate with the secretary of state. The certificate must set forth the names of all corporations represented by the agent and the old registered address for each corporation, and must certify the new registered address for each corporation and the date on which the change is

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209. REV. MODEL BUS. CORP. ACT §§ 5.02(b), 15.08(b) (1984). The 1969 Model Business Corporation Act is similar. See MODEL BUS. CORP. ACT §§ 13, 114 (1969).

210. *Id.*

211. See REV. MODEL BUS. CORP. ACT §§ 5.02(b), 15.08(b) (1984); MODEL BUS. CORP. ACT ANN. § 5.02 cmt. (Supp. 1993).

212. DEL. CODE ANN. tit. 8, § 134 (1991).

effective.<sup>213</sup> Where the registered agent changes the name of the corporation acting as registered agent, the agent must execute, acknowledge, and file with the secretary of state a certificate setting forth: (1) the new name of the registered agent; (2) the former name of the registered agent; and (3) the names of all corporations represented by the agent and the registered address for each corporation.<sup>214</sup> While the Delaware statute does not expressly require the registered agent to give notice to the corporation, prudent business practice requires such notice.

Where the address of the registered agent is changed, the Delaware provision requires the recording of a copy of the certificate, certified by the secretary of state, in the office of the recorder of the county in which the registered office of the corporation is located and, if the office is changed from one county to another, in the office of the recorder of the county in which the registered office was formerly located.<sup>215</sup> Where the name of the individual or corporation acting as registered agent is changed, a copy of the certificate, certified by the secretary of state, must be recorded in the office of the recorder of the county in which the registered office of the corporation is located.<sup>216</sup>

California has a special provision for statutory agents which are themselves corporations. A statutory agent which is a corporation may notify the secretary of state of a change in its address by executing in its corporate name a supplemental certificate and delivering it to the secretary of state.<sup>217</sup> However, where the address of a statutory agent which is not a corporation is changed, the corporation itself must file an updated annual statement setting forth the new address of its agent.<sup>218</sup> New York does not have a provision similar to the Revised Model Act or the Delaware provisions. Thus, a change in the

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213. *Id.* § 134(a).

214. *Id.* § 134(b). *See generally supra* part III.B. (discussing the filing of documents).

215. DEL. CODE ANN. tit. 8, § 134(a) (1991).

216. *Id.* § 134(b).

217. CAL. CORP. CODE § 1505(b) (West 1990).

218. *Id.* §§ 1502(e), 2117(d).

name or address of a corporation's registered agent requires amendment of the articles of incorporation.<sup>219</sup>

### E. *Resignation of Agent*

A registered agent, such as a corporation service company, which receives an annual fee from a corporation for serving as its registered agent will wish to resign if the corporation does not pay its annual fees. An unpaid corporation service company will also wish to discontinue service as the registered office of the corporation.<sup>220</sup> In the absence of an express statutory provision permitting the agent to resign and to discontinue the registered office, the registered agent may continue to have the responsibility to forward communications and provide services to a client even though the client fails to pay for those services.

A registered agent may resign by filing a certificate of resignation, although some statutes provide that the resignation is not immediately effective. Generally, either the registered agent or the secretary of state is required to give notice of the resignation to the designating corporation. Where the agent fails to comply with the statutory requirements governing resignation, the agent remains the registered agent and service of process on the agent is valid.<sup>221</sup>

Under the Revised Model Business Corporation Act, a registered agent may resign his or her agency appointment by filing the original and two exact or conformed copies of a statement of resignation with the secretary of state.<sup>222</sup> The statement may also indicate that the registered office of the corporation is discontinued.<sup>223</sup> The Revised Model Act requires the secretary of state to mail one copy of the statement to the registered

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219. See N.Y. BUS. CORP. LAW § 801(b)(5) (McKinney 1986). In this situation the New York statute permits the articles to be amended by the board of directors. *Id.* § 803(b).

220. MODEL BUSINESS CORP. ACT ANN. § 5.03 cmt. (Supp. 1993).

221. *Louisiana Bank and Trust Co. v. Murcambyr, Inc.*, 419 So. 2d 106, 108 (La. Ct. App. 1982) (failure to give written notice to recorder of mortgages of county in which registered office was located), *cert. denied*, 423 So. 2d 1148 (La. 1982).

222. REV. MODEL BUSINESS CORP. ACT §§ 5.03(a), 15.09(a) (1984). See generally *supra* part III.B. (discussing the filing of documents).

223. REV. MODEL BUSINESS CORP. ACT §§ 5.03(a), 15.09(a) (1984).

office of the corporation, if it is not discontinued, and the other to the principal office of the corporation.<sup>224</sup> The termination of the agency appointment and, where applicable, the discontinuance of the registered office are effective on the thirty-first day after the filing of the statement.<sup>225</sup>

Under the California statute, an agent designated for service of process may resign by filing a signed and acknowledged statement of resignation with the secretary of state. The secretary of state is required to give written notice of the resignation to the corporation by mail at its principal executive office. The resignation is effective immediately.<sup>226</sup> Under the New York statute, a registered agent may resign by filing with the department of state a certificate entitled "Certificate of resignation of registered agent of (name of designating corporation)" under section 305 of the Business Corporation Law.<sup>227</sup> The certificate must be signed and verified, and set forth: (1) that the agent resigns as registered agent for the designating corporation; (2) the date upon which the designating corporation filed its articles of incorporation or application for authority to do business in New York; and (3) that the agent sent a copy of the certificate of resignation to the designating corporation at the post office address on file with the department of state for service of process upon the corporation or, where that is the address of the registered agent, at the corporation's office in the state in which it is incorporated.<sup>228</sup> The resignation is effective thirty days after the filing of the certificate of resignation by the

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224. *Id.* §§ 5.03(b), 15.09(b). The 1969 Model Business Corporation Act permits a registered agent to resign by filing a written notice of resignation, executed in duplicate, with the secretary of state. MODEL BUSINESS CORP. ACT §§ 13, 114 (1969). The Act requires the secretary of state to mail a copy of the notice to a domestic corporation at its registered office. *Id.* § 13. The 1969 Act "resulted in a circularity in notice: the duplicate was mailed back to the agent who originally filed the notice." MODEL BUSINESS CORP. ACT ANN. § 5.03 cmt. (Supp. 1993). The Revised Model Act avoids the problem of the corporation "receiving" notice through an agent whose resignation is being communicated" by requiring the secretary of state to mail a copy to the principal office of the corporation. *Id.*

225. REV. MODEL BUSINESS CORP. ACT §§ 5.03(c), 15.09(c) (1984); *see also* MODEL BUSINESS CORP. ACT §§ 113-14 (1969) ("upon the expiration of thirty days after receipt of such notice by the secretary of state.").

226. CAL. CORP. CODE § 1503 (West 1990).

227. N.Y. BUS. CORP. LAW § 305(c) (McKinney 1986).

228. *Id.*

department of state unless the corporation revokes the agency or designates a new agent before the end of the thirty days.<sup>229</sup>

The Delaware General Corporation Law permits the resignation of a registered agent to be coupled with the appointment of a successor agent. If the resignation is coupled with such an appointment, then the certificate of resignation must include a statement of the name and address of the successor agent and an attached statement of approval from each corporation affected by the change.<sup>230</sup> The statement of each corporation must be executed and acknowledged in accordance with the filing requirements of the statute.<sup>231</sup> The change of registered agent is effective as to the corporation approving the change upon the issuance of a certificate by the secretary of state. The certificate of the secretary of state is recorded in accordance with the filing requirements of the statute.<sup>232</sup> Where the location of the registered office is changed from one county to another, the certificate is also recorded in the office of the recorder in the county in which the new office is located.<sup>233</sup>

Where the resignation of the registered agent of a domestic corporation is not coupled with the appointment of a successor agent, the resignation is not effective until sixty days after the certificate of resignation is filed.<sup>234</sup> In addition, the registered agent must attach to the certificate an affidavit that the designating corporation was given notice by certified or registered mail at least thirty days prior to the filing of the certificate.<sup>235</sup> The secretary of state is required to notify the recorder of the

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229. *Id.* § 305(d).

230. DEL. CODE ANN. tit. 8, § 135 (1991).

231. *See id.* § 103 (c)(4)-(5) (Supp. 1992). *See also supra* part III.B. (discussing filing requirements).

232. DEL. CODE ANN. tit. 8, § 103 (Supp. 1992).

233. *Id.* § 135.

234. *Id.* § 136(a).

235. *Id.* The affidavit must be of the registered agent if a natural person, or of the president, a vice president, or the secretary of a registered agent which is a corporation. The required notice must be mailed to the principal office of the corporation outside the state, if known by the registered agent, or if not, "to the last known address of the attorney or other individual at whose request such registered agent was appointed for such corporation . . . ." *Id.*

county in Delaware in which the corporation's articles of incorporation are filed of the resignation.<sup>236</sup>

The registered agent of a foreign corporation authorized to do business in Delaware may resign by filing a statement with the secretary of state which indicates the agent is unwilling to continue as the agent of the corporation. The statement must include "the post-office address of the main or headquarters office of the foreign corporation."<sup>237</sup> The secretary of state is required to give written notice by mail to the corporation.<sup>238</sup> The resignation is effective thirty days after the statement is filed with the secretary of state.<sup>239</sup>

A corporation is generally required to appoint a new registered agent upon resignation of the previous registered agent.<sup>240</sup>

#### F. *Failure to Maintain Agent or Office, or to Report Changes*

The need for a corporation to designate a new registered agent or registered office may arise as a result of: (1) the death of an agent who is a natural person; (2) the failure of an agent who is a natural person to remain a resident of the state; (3) the resignation of an agent; (4) the dissolution of an agent that is a corporation; or (5) the revocation or surrender of authority to transact business in the state by an agent that is a foreign corporation.<sup>241</sup> A number of potential consequences flow from the failure of a corporation to maintain a registered agent or registered office. First, under a number of corporation statutes, the secretary of state may administratively dissolve a domestic corporation.<sup>242</sup> Second, in most states the secretary of state

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236. *Id.* § 136(b).

237. *Id.* § 377(b).

238. The notice must be addressed to the corporation at the address set forth in the statement of resignation as well as the post office address stated in the corporation's last annual report to the secretary of state. *Id.*; see also *id.* § 374.

239. *Id.* § 377(b).

240. See generally *infra* part V.F.

241. Cf. CAL. CORP. CODE § 1504 (West 1990) (listing situations in which a corporation is required to designate a new agent for service of process); DEL. CODE ANN. tit. 8, § 377(c) (1991) (requiring foreign corporations to designate a replacement agent in specified circumstances).

242. See, e.g., REV. MODEL BUSINESS CORP. ACT § 14.20(3)-(4) (1984). See also *infra*

may revoke the authority of a foreign corporation authorized to transact business within the state.<sup>243</sup>

Finally, in most states alternative methods are available to serve process on a corporation where the corporation fails to maintain the required statutory agent or where the statutory agent cannot be found. Thus, under the Revised Model Business Corporation Act, where a corporation does not maintain a registered agent or where the registered agent cannot be served by exercise of reasonable diligence, process may be served on the corporation by registered or certified mail (return receipt requested) addressed to the secretary of the corporation at its principal office.<sup>244</sup> The principal office of the corporation is the office designated in the annual report of the corporation filed with the secretary of state.<sup>245</sup> The service is effective on the earliest of the following: (1) the date the mailed process is received by the corporation; (2) the date shown on the return receipt, if signed; or (3) five days after deposit in the United States mail if postpaid and properly addressed.<sup>246</sup>

Similarly, earlier versions of the Model Business Corporation Act and the California and Delaware statutes authorize service of process upon the secretary of state where the corporation fails to maintain the required agent or where the agent cannot be located by exercise of reasonable diligence.<sup>247</sup> However, it may be necessary either to obtain a court order allowing process to be served upon the secretary of state<sup>248</sup> or to demonstrate inability to serve process upon an officer or director of the corporation.<sup>249</sup> The secretary of state is required to for-

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part VI.A.

243. See, e.g., *id.* § 15.30(3)-(4) (1984). See also *infra* part VI.E.

244. REV. MODEL BUSINESS CORP. ACT §§ 5.04(b), 15.10(b) (1984).

245. *Id.* § 1.40 (17) and 16.22(a)(3).

246. *Id.* §§ 5.04(b), 15.10(c).

247. See CAL. CORP. CODE §§ 1702(a), 2111(a) (West 1990); DEL. CODE ANN. tit. 8, §§ 136(d), 321(b), 376(b) (1991); MODEL BUSINESS CORP. ACT § 14 (1969); MODEL BUSINESS CORP. ACT § 13 (1960).

248. See CAL. CORP. CODE §§ 1702(a), 2111(a) (West 1990).

249. See DEL. CODE ANN. tit. 8, § 321(a)-(b) (1991); see also *Bilek & Purcell Indus., Inc. v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225, 226 (Tex. Ct. App. 1985) (holding the requirement of reasonable diligence was not met; therefore, substituted service on the secretary of state was invalid); *General Office Outfitters, Inc. v. Holt*, 670 S.W.2d 748, 749-750 (Tex. Ct. App. 1984) (holding that the record did not

ward a copy of the process to the corporation.<sup>250</sup> Failure of the corporation to receive actual notice of the service of process on the secretary of state does not invalidate the service.<sup>251</sup> However, some cases hold that a failure of the secretary of state to forward a copy of process served upon him or her prevents the acquisition of jurisdiction over the corporation.<sup>252</sup>

In New York, a domestic corporation or a foreign corporation authorized to transact business in the state must designate the secretary of state as its agent for service of process.<sup>253</sup> The corporation may, but is not required to, appoint an additional agent for service of process.<sup>254</sup>

## VI. ENFORCEMENT OF STATUTORY REQUIREMENTS

### A. *Administrative Dissolution—Grounds*

The Revised Model Business Corporation Act permits the secretary of state to commence a proceeding for the administrative dissolution of a corporation.<sup>255</sup> While the Revised Model Act refers to a "proceeding,"<sup>256</sup> administrative dissolution under the Act is a relatively summary process which does not require judicial action. The grounds for administrative dissolution

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show reasonable diligence in attempting to serve the registered agent and thus substituted service on the secretary of state was invalid).

250. See CAL. CORP. CODE §§ 1702(b), 2111(b) (West 1990); DEL. CODE ANN. tit. 8, § 321(b) (1991); MODEL BUSINESS CORP. ACT § 14 (1969); MODEL BUSINESS CORP. ACT § 13 (1960).

251. Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 476 (Tex. Ct. App. 1983); Colonial Sand & Stove Co. v. Enrico & Sons Contractors, 411 N.Y.S.2d 244, 245 (N.Y. App. Div. 1978) (mem.).

252. See, e.g., Southwestern Remodelers v. Lumaside, Inc., 501 S.W.2d 759, 760 (Tex. Civ. App. 1973) (reversing the default judgment and holding that there was no showing that the secretary of state forwarded a copy of process to the corporation in the manner required by statute). Cf. N.Y. BUS. CORP. LAW § 306(b)(1) (McKinney Supp. 1993) (indicating that service on corporation is complete when secretary of state is served); Micarelli v. Regal Apparel, Ltd., 381 N.Y.S.2d 511, 512 (N.Y. App. Div. 1976) (holding that service was complete when the secretary of state was served; however, the default was clearly excusable and the trial court did not err in vacating default judgment).

253. N.Y. BUS. CORP. LAW § 304(b) (McKinney 1986).

254. *Id.* § 305(a); see also *supra* part V.A.

255. REV. MODEL BUSINESS CORP. ACT § 14.21 (1984).

256. *Id.* § 14.20.

are: (1) nonpayment of any franchise taxes or penalties imposed by the Revised Model Act or other law if not paid within sixty days after they are due;<sup>257</sup> (2) failure to deliver the annual report to the secretary of state within sixty days after it is due;<sup>258</sup> (3) failure to maintain a statutory agent or registered office within the state for a period of sixty days or more;<sup>259</sup> (4) failure to notify the secretary of state within sixty days of a change of registered agent or registered office, resignation of registered agent, or discontinuance of registered office;<sup>260</sup> and (5) expiration of the period of incorporation, specified in the articles of incorporation.<sup>261</sup> The ground for dissolution may exist because of an oversight on the part of the corporation or because the corporation has been abandoned.

Earlier versions of the Model Business Corporation Act did not permit administrative dissolution of a corporation. Under this act, involuntary dissolution of a corporation could be accomplished only by a judicial proceeding brought by the state attorney general.<sup>262</sup> States generally rejected the earlier Model Act approach of requiring a judicial proceeding in every case to dissolve a corporation for failure to comply with a mandatory statutory duty and, therefore, the Revised Model Act abandons this approach in favor of administrative dissolution.<sup>263</sup> Administrative dissolution "not only reduces the number of records maintained by the secretary of state, but also avoids further wasteful attempts to compel compliance by the abandoned corporations and returns the corporate name promptly to the status of available names."<sup>264</sup>

Most state statutes permit administrative dissolution of corporations by the secretary of state upon specified grounds. California provides for the administrative dissolution of a corporation by the secretary of state for failure to file an annual report

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257. *Id.* § 14.20(1).

258. *Id.* § 14.20(2).

259. *Id.* § 14.20(3).

260. *Id.* § 14.20(4).

261. *Id.* § 14.20(5).

262. See MODEL BUSINESS CORP. ACT § 94 (1969); MODEL BUSINESS CORP. ACT § 87 (1960).

263. MODEL BUSINESS CORP. ACT ANN. § 14.20 cmt. (Supp. 1993).

264. *Id.*

with the secretary of state for two consecutive years.<sup>265</sup> In addition, the Franchise Tax Board may suspend the corporate powers, rights, and privileges of a domestic corporation where the corporation fails to pay any franchise tax, penalty, or interest within a specified period of time after the due date<sup>266</sup> or fails to file a franchise tax return.<sup>267</sup> Delaware requires administrative dissolution by the secretary of state for failure to designate a replacement registered agent within sixty days of the filing of a certificate of resignation by the existing registered agent.<sup>268</sup> Dissolution is also required for failure to pay to the State of Delaware any franchise tax or taxes for one year unless the secretary of state, upon a showing of good cause, gives additional time for payment.<sup>269</sup> New York provides for administrative dissolution of a corporation by the secretary of state for failure to file the required annual franchise tax report for a period of two consecutive years or failure to pay taxes assessed under the New York Tax Law for a period of two years.<sup>270</sup>

#### B. *Administrative Dissolution—Procedure*

Under the Revised Model Business Corporation Act, the first step in administrative dissolution is for the secretary of state to serve written notice on the corporation once it has been determined that a ground or grounds for dissolution exists.<sup>271</sup> The corporation is then given a limited period of time to correct the grounds for dissolution or to demonstrate to the satisfaction of

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265. CAL. CORP. CODE § 2205(a) (West 1990).

266. CAL. REV. & TAX. CODE § 23301 (West 1992).

267. *Id.* § 23301.5.

268. DEL. CODE ANN. tit. 8, § 136(c) (1991) (allowing secretary of state to declare charter forfeited).

269. *Id.* § 510. The Delaware corporation statute also provides that a corporation which fails to pay any tax or fee payable to the secretary of state upon filing any certificate or paper with the secretary of state before the ninetieth day after the mailing of a demand for payment shall "cease to be in good standing." *Id.* § 391(i). The secretary of state also must refuse to accept any filing by the corporation while it is not in good standing. *Id.*

270. N.Y. TAX LAW § 203-a (McKinney 1986).

271. REV. MODEL BUSINESS CORP. ACT § 14.21(a) (1984). Notice must be served in accordance with the rules outlining proper service. *Id.* § 5.04.

the secretary of state that grounds for dissolution do not exist.<sup>272</sup> Since the ground for dissolution is often the result of oversight, an active corporation will usually correct the problem after receipt of this notice.<sup>273</sup> However, the reasons a corporation failed to keep matters current in the first place may continue to exist resulting in the corporation also ignoring the notice. In addition, a corporate business often fails and the corporation is abandoned. If the grounds are not corrected, the secretary of state administratively dissolves the corporation. Under the Revised Model Business Corporation Act, this is accomplished by signing a Certificate of Dissolution, filing the original, and mailing a duplicate to the corporation.<sup>274</sup> No judicial action is required.

Most statutes permitting administrative dissolution require notice to the corporation of the grounds for administrative dissolution,<sup>275</sup> and allow administrative dissolution if the grounds are not corrected within a specified time.<sup>276</sup> Where the grounds are not corrected, statutes may also require the secretary of state to give actual or constructive notice of the administrative dissolution to the corporation.<sup>277</sup>

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272. *Id.* § 14.21(b) (indicating that demonstration of the fact that grounds do not exist must occur within sixty days of the service of the notice).

273. *See* MODEL BUSINESS CORP. ACT ANN. § 14.21 cmt. (Supp. 1993). *Cf.* Frederic G. Krapf & Son v. Gorson, 243 A.2d 713, 714 (Del. 1968) (involving "inadvertent neglect to file annual reports and pay the franchise taxes").

274. REV. MODEL BUSINESS CORP. ACT § 14.21(b) (1984).

275. *See, e.g.,* CAL. CORP. CODE § 2205(b) (West 1990) (discussing notice to corporation regarding failure to file annual statement with the secretary of state); DEL. CODE ANN. tit. 8, § 136(a) (1991) (requiring a registered agent to give notice of resignation to the corporation at least thirty days prior to filing the certificate of resignation). *Id.* § 510 (requiring secretary of state on or before the last day of November of each year to give notice of failure to pay franchise tax or taxes).

276. *See, e.g.,* CAL. CORP. CODE § 2205(b) (West 1990) (informing that corporate rights will be suspended after sixty days if no annual statement is filed with the secretary of state); DEL. CODE ANN. tit. 8, § 136(c) (1991) (declaring charter forfeited if new registered agent is not designated within sixty days after the filing of the certificate of resignation). *Id.* § 510 (voiding the charter of the corporation if taxes not paid on or before March 1 of the following year). *See also* MODEL BUSINESS CORP. ACT ANN. § 14.21 annot. (Supp. 1993).

277. *See, e.g.,* CAL. CORP. CODE § 2205(a) (West 1990) (requiring secretary of state to give notice to Franchise Tax Board and to the corporation); N.Y. TAX LAW § 203-a(3) (McKinney 1986) (requiring filing of proclamation by secretary of state containing list of corporations dissolved and requiring publication of a copy of the proclamation in the state bulletin).

### C. *Reinstatement After Administrative Dissolution*

A corporation that has been administratively dissolved may apply for reinstatement. Under the Revised Model Business Corporation Act the corporation may apply to the secretary of state for reinstatement within two years after the dissolution.<sup>278</sup> The application must: (1) recite the name of the dissolved corporation and the date of its dissolution; (2) state that the ground(s) for dissolution either did not exist or are corrected; (3) state that the corporation's name complies with the requirements of the Act; and (4) contain a certificate from the taxing authority stating that all taxes owed by the corporation are paid.<sup>279</sup> If the secretary of state determines that the application meets the statutory requirements and that the information in it is correct, he or she cancels the certificate of dissolution and prepares a certificate of reinstatement.<sup>280</sup> The secretary of state files the original of the certificate of reinstatement and serves a copy of it on the corporation.<sup>281</sup> The certificate of reinstatement states an effective date. When the reinstatement takes effect it relates back to the date of the dissolution and the corporation resumes carrying on its business as if the dissolution never occurred.<sup>282</sup>

If the secretary of state denies an application for reinstatement, he or she must serve the corporation with a written notice of the denial which explains the reason or reasons for the denial.<sup>283</sup> The corporation may appeal the denial of reinstatement within thirty days of service of the notice of denial by petitioning the appropriate court to set aside the administrative dissolution.<sup>284</sup> The court may summarily order the secretary of state to reinstate the corporation or may take such

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278. REV. MODEL BUSINESS CORP. ACT § 14.22(a) (1984).

279. *Id.*

280. *Id.* § 14.22(b).

281. *Id.* The notice must be served in accordance with § 5.04. *Id.*

282. *Id.* See *infra* part VI.D. regarding the effect of reinstatement.

283. REV. MODEL BUSINESS CORP. ACT § 14.23(a) (1984). The notice must be served in accordance with § 5.04. *Id.*

284. *Id.* § 14.23(b). Copies of the certificate of dissolution, the application for reinstatement, and the notice of denial of reinstatement must be attached to the petition for reinstatement. *Id.*

other action as it deems appropriate.<sup>285</sup> The final action of the court may be appealed in the same manner as in other civil cases.<sup>286</sup>

In Delaware, a corporation that has been administratively dissolved may be revived by filing with the secretary of state a certificate containing specified information.<sup>287</sup> As a condition of revival, a corporation is generally required to pay to the state a sum equal to all franchise taxes, penalties, and interest due at the time of administrative dissolution.<sup>288</sup> A corporation which is revived more than five years after the termination of its existence is required to pay three times the amount of the franchise tax that would be payable by the corporation during the year in which it is revived rather than the amounts due at the time of dissolution.<sup>289</sup> Under the Delaware statute, the revived corporation may find its former name unavailable and may be required to select a new name.<sup>290</sup> The revival of a corporation under the Delaware statute has the same effect as if the dissolution never occurred.<sup>291</sup>

Under the California corporation statute, a corporation which is suspended by the secretary of state for failure to file its annual report with the secretary of state may usually be relieved of that suspension by filing the report.<sup>292</sup> A corporation which is suspended by the Franchise Tax Board may be revived upon written application to the Board and payment of all taxes, deficiencies, interest, and penalties which are due.<sup>293</sup> Similarly, in New York a corporation which is declared dissolved for failure to file annual franchise tax reports with the state tax commission or for delinquency in the payment of taxes may be

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285. *Id.* § 14.23(c).

286. *Id.* § 14.23(d).

287. DEL. CODE ANN. tit. 8, § 312(c), (d) (1991).

288. *Id.* § 312(g).

289. *Id.*

290. *Id.* § 312(f).

291. *Id.* § 312(e).

292. CAL. CORP. CODE § 2205(d) (West 1990).

293. CAL. REV. & TAX. CODE § 23305 (West 1992). The revival is effective upon the issuance of a certificate of revivor by the Franchise Tax Board. *Id.*

reinstated by filing with the department of state a certificate from the tax commission.<sup>294</sup>

Generally, the name of a corporation which is administratively dissolved becomes available for adoption by others. Therefore, a corporation which is reinstated after administrative dissolution may only use its former name if the name is still available.<sup>295</sup> Where the name is no longer available, the corporation must adopt some other name.<sup>296</sup> In New York, however, the name of a corporation which is declared dissolved is reserved for a period of three months after the proclamation of dissolution by the secretary of state.<sup>297</sup>

#### D. *Effect of Reinstatement*

Where a corporation is reinstated after it has been administratively dissolved or suspended, questions arise regarding the effect of the reinstatement. The two basic questions are: (1) whether reinstatement validates actions taken on behalf of the corporation during the dissolution; and (2) whether reinstatement relieves corporate directors and officers of potential liability for actions taken on behalf of the corporation during the period of dissolution.

Many corporation statutes expressly provide that reinstatement relates back and the corporation may resume business as though the dissolution never occurred.<sup>298</sup> Under such a statute, a reinstated corporation may pursue a cause of action which accrued during the period of dissolution.<sup>299</sup> Even if a

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294. N.Y. TAX LAW § 203-a(7) (McKinney Supp. 1993).

295. See CAL. CORP. CODE § 2205(d) (West 1990); CAL. REV. & TAX. CODE § 23305a (West 1992); DEL. CODE ANN. tit. 8, § 312(f) (1991); MODEL BUSINESS CORP. ACT ANN. § 14.22(a)(3) cmt. (Supp. 1993) (stating that the name must be available when corporation petitions for reinstatement); REV. MODEL BUSINESS CORP. ACT § 14.22(a)(3) (1984).

296. See, e.g., DEL. CODE ANN. tit. 8, § 312(f) (1991).

297. N.Y. TAX LAW § 203-a(6) (McKinney 1986).

298. See, e.g., DEL. CODE ANN. tit. 8, § 312(e) (1991); REV. MODEL BUSINESS CORP. ACT § 14.22(c) (1984). Cf. N.Y. TAX LAW § 203-a(7) (McKinney Supp. 1993).

299. See, e.g., *LeLac Prop. Owners' Ass'n v. Routh*, 493 So. 2d 1131, 1133 (Fla. Dist. Ct. App. 1986); *M & M Constr. Co. v. Great Am. Ins. Co.*, 747 S.W.2d 552, 555 (Tex. Ct. App. 1988) (governing statute providing reinstatement relates back; trial court erred in dismissing with prejudice without allowing corporation reasonable op-

statute does not expressly provide that reinstatement validates corporate action taken during the period of dissolution, courts generally permit an action by a reinstated corporation based upon a transaction during that period.<sup>300</sup> In addition, courts permit continuation of a cause of action brought by the corporation during the period of dissolution.<sup>301</sup> Once a corporation cures its failure to comply with statutory requirements, no purpose is served in permitting a stranger to the dealings between the corporation and the state to escape an obligation to the corporation.<sup>302</sup> Of course, where a statute expressly provides that reinstatement does not relate back or does not validate corporate actions during the period of dissolution, courts respect the clear legislative intent.<sup>303</sup>

A more difficult question is the effect of reinstatement on the liability of directors and officers. The Delaware statute expressly provides that upon reinstatement the corporation is exclusively liable on all contracts and acts done on its behalf during the period of forfeiture of its charter.<sup>304</sup> However, in the absence of such a specific legislative direction, most cases hold that reinstatement of the corporation does not absolve a director or an officer from liability on contracts made on behalf of the corporation during the period of dissolution.<sup>305</sup> Several cas-

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portunity to pay delinquent taxes).

300. See *Regal Package Liquor, Inc. v. J.R.D., Inc.*, 466 N.E.2d 409, 411-12 (Ill. App. Ct. 1984).

301. See *La France Enterprises v. Van Der Linden*, 138 Cal. Rptr. 690, 692 (Cal. Ct. App. 1977) (suspending corporation during trial).

302. *LeLac Prop. Owners' Ass'n v. Routh*, 493 So. 2d 1131, 1333 (Fla. Dist. Ct. App. 1986) (no evidence of legislative intent to provide windfall to parties who dealt with the corporation; thus the statute made reinstatement retroactive); *Regal Package Liquor v. J.R.D., Inc.*, 466 N.E.2d 409, 411-12 (Ill. App. Ct. 1984) (governing statute silent on effect of reinstatement).

303. See *Dawn Constr. Co. v. Paris Home Builders, Inc.*, 103 N.W.2d 410, 411 (Mich. 1960) (finding that statute then in effect provided that corporation shall not maintain a suit based upon any contract entered into while its corporate powers were suspended).

304. DEL. CODE ANN. tit. 8, § 312(e) (1990); see also *Frederic Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968) (holding that reinstatement absolved officers from personal liability on contract).

305. See *T-K Distrib., Inc. v. Soldevere*, 704 P.2d 280, 282 (Ariz. Ct. App. 1985); *J.M. Lynne Co., Inc. v. Geraghty*, 528 A.2d 786, 789-93 (Conn. 1987) (applying New York Law); *Mobil Oil Corp. v. Thoss*, 385 So. 2d 726, 727 (Fla. Dist. Ct. App. 1980) (per curiam); *Priceco, Inc. v. Youngstrom*, 786 P.2d 606, 609-11 (Idaho Ct. App. 1990);

es place substantial weight on statutory provisions imposing liability on persons who presume to act as a corporation without authority to do so.<sup>306</sup> In addition, a court imposing liability may construe a statute which provides that reinstatement relates back as merely validating corporate acts (so as to permit the corporation to sue), but not as absolving officers and directors of personal liability.<sup>307</sup> There is conflicting authority regarding whether knowledge of the dissolution or personal participation in the transaction are prerequisites for the imposition of liability.<sup>308</sup>

On the other hand, several cases hold that officers or directors have no personal liability after reinstatement.<sup>309</sup> At least one case is based upon de facto corporation and estoppel theories.<sup>310</sup> Another case is based, in large part, on the harshness of not extending the retroactive effect of reinstatement to the personal liability of officers.<sup>311</sup>

#### E. *Revocation of Certificate of Authority—Grounds*

The Revised Model Business Corporation Act permits the secretary of state to commence a proceeding to revoke the certificate of authority of a foreign corporation to transact business

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Kessler Distrib. Co. v. Neill, 317 N.W.2d 519, 522 (Iowa Ct. App. 1982); Nichols-Homesfield, Inc. v. Mid-American Constr. Supply, Inc., 643 P.2d 309, 310 (Okla. 1982).

306. See *T-K Distrib., Inc.*, 704 P.2d at 282; *Mobil Oil Corp.*, 385 So. 2d, at 726-27; *Kessler Distrib. Co.*, 317 N.W.2d at 521. The Revised Model Business Corporation Act and earlier versions of the Model Act contain such provisions. See REV. MODEL BUSINESS CORP. ACT § 2.04 (1984); MODEL BUSINESS CORP. ACT § 146 (1969); MODEL BUSINESS CORP. ACT § 139 (1960).

307. See *J.M. Lynne Co.*, 528 A.2d at 789 (applying New York law); *Bethlehem Steel Corp. v. Giese*, 681 P.2d 769, 771 (Okla. 1984).

308. Most courts hold that liability is limited to persons who knew or should have known of the dissolution. See *Mobil Oil Corp.*, 385 So. 2d at 727; *Priceco, Inc.*, 786 P.2d at 610 (requiring personal participation); *Steve's Equipment Serv., Inc. v. Riebrandt*, 459 N.E.2d 21, 24 (Ill. App. Ct. 1984) (holding that vice-president was liable although corporation never reinstated). But see *Kessler Distrib. Co.*, 317 N.W.2d at 522 (holding that knowledge is not essential for personal liability).

309. See *Clark-Franklin-Kingston Press, Inc. v. Romano*, 529 A.2d 240, 242 (Conn. App. Ct.), cert. denied, 531 A.2d 935 (Conn. 1987); *Bergy Bros., Inc. v. Zeeland Feeder Pig, Inc.*, 327 N.W.2d 305, 308-09 (Mich. 1982).

310. See *Clark-Franklin-Kingston Press, Inc.*, 529 A.2d at 242-44.

311. See *Bergy Bros., Inc.*, 327 N.W.2d at 309.

in the state.<sup>312</sup> The grounds for commencement of such proceedings are: (1) nonpayment of any franchise taxes or any penalties imposed by the Revised Model Act or other law within sixty days after they are due;<sup>313</sup> (2) failure to deliver the annual report to the secretary of state within sixty days after it is due;<sup>314</sup> (3) failure to maintain a statutory agent or registered office within the state for a period of sixty days or more;<sup>315</sup> (4) failure to notify the secretary of state within sixty days of a change of registered agent or registered office, resignation of registered agent, or discontinuance of registered office;<sup>316</sup> (5) signing of a document by an incorporator, director, officer, or agent of the foreign corporation which he or she knows is false in any material respect where he or she intends that the document be filed with the secretary of state;<sup>317</sup> or (6) receipt by the secretary of state of a duly authenticated certificate from the appropriate official in the state or foreign corporation in which the corporation is incorporated stating that the corporation is dissolved or is no longer in existence as the result of a merger.<sup>318</sup> Earlier versions of the Model Business Corporation Act have similar provisions.<sup>319</sup>

California provides for the suspension of the authority of a foreign corporation by the secretary of state upon its failure to file an annual report with the secretary of state for two consecutive years.<sup>320</sup> In addition, the Franchise Tax Board may forfeit the corporate powers, rights, and privileges of a foreign corporation in California where the corporation does not pay any franchise tax, penalty, or interest within a specified period of time after the due date<sup>321</sup> or fails to file a franchise tax return.<sup>322</sup>

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312. REV. MODEL BUSINESS CORP. ACT § 15.30 (1984).

313. *Id.* § 15.30(2).

314. *Id.* § 15.30(1).

315. *Id.* § 15.30(3).

316. *Id.* § 15.30(4).

317. *Id.* § 15.30(5).

318. *Id.* § 15.30(6).

319. *See* MODEL BUSINESS CORP. ACT § 121 (1969); MODEL BUSINESS CORP. ACT § 114 (1960).

320. CAL. CORP. CODE § 2206(a) (West 1990).

321. CAL. REV. & TAX. CODE § 23301 (West 1992).

322. *Id.* § 23301.5.

Delaware provides for the forfeiture of the authority of a foreign corporation by the secretary of state for failure to designate a replacement registered agent within sixty days of the filing of a certificate of resignation by the existing registered agent,<sup>323</sup> and for failure to file the annual report required of foreign corporations doing business in Delaware.<sup>324</sup>

New York requires the secretary of state to declare the authority of a foreign corporation to do business in the state annulled for failure to file the required annual report for a period of two consecutive years or failure for any two years to pay taxes assessed by the New York Tax Law.<sup>325</sup>

#### F. *Revocation of Certificate of Authority—Procedure*

The first step in the revocation of a certificate of authority of a foreign corporation under the Revised Model Business Corporation Act is for the secretary of state to serve written notice on the corporation that he or she has determined that a ground or grounds for revocation exists.<sup>326</sup> The corporation is then given a limited period of time to correct the grounds for revocation or to demonstrate to the satisfaction of the secretary of state that no grounds for revocation of the certificate of authority exist.<sup>327</sup> Since the existence of grounds for revocation is often the result of oversight, the problems will often be corrected after receipt of this notice by the foreign corporation.<sup>328</sup> If the grounds are not corrected, the secretary of state administratively revokes the foreign corporation's certificate of authority. Under the Revised Model Business Corporation Act, this is

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323. DEL. CODE ANN. tit. 8, § 136(c) (1991).

324. *Id.* § 375. The Delaware corporation statute also provides that a foreign corporation which fails to pay any tax or fee payable to the secretary of state upon filing of any certificate or paper with the secretary of state before the ninetieth day after the mailing of a demand for payment shall "cease to be in good standing." *Id.* § 391(i). The secretary of state shall refuse to accept any filing by the corporation while it is not in good standing. *Id.*

325. N.Y. TAX LAW § 203-b (McKinney 1986).

326. REV. MODEL BUSINESS CORP. ACT § 15.31(a) (1984). The written notice must be served in accordance with § 15.10. *Id.*

327. *Id.* § 15.31(b) (1984) (within sixty days of the service of the notice).

328. *Cf.* MODEL BUSINESS CORP. ACT ANN. § 14.21 cmt. (Supp. 1993) (discussing notice of grounds for administrative dissolution).

accomplished by signing a certificate of revocation, filing the original, and mailing a duplicate to the corporation.<sup>329</sup> Earlier versions of the Model Business Corporation Act also require notice to the corporation and a grace period,<sup>330</sup> as well as issuance of a certificate of revocation by the secretary of state.<sup>331</sup>

Most state statutes permitting revocation of the authority of a foreign corporation to transact business in a state require notice to the corporation of the existence of grounds for revocation of authority to transact business,<sup>332</sup> and revocation of the authority to transact business within the state if the grounds are not corrected within a specified time.<sup>333</sup> Where the grounds are not corrected, some statutes also require the secretary of state to give actual or constructive notice of the revocation of authority to the corporation.<sup>334</sup>

#### *G. Revocation of Certificate of Authority—Appeal and Reinstatement*

Under the Revised Model Business Corporation Act, a foreign corporation may appeal the revocation of its certificate of authority to transact business in the state within thirty days of the service of the certificate of revocation.<sup>335</sup> The revocation is appealed by petitioning the appropriate court to set aside the

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329. REV. MODEL BUSINESS CORP. ACT § 15.31(b) (1984).

330. See, e.g., MODEL BUSINESS CORP. ACT § 121 (1969).

331. See, e.g., *id.* § 122.

332. See, e.g., CAL. CORP. CODE §§ 2205(b), 2206(a) (West 1990) (notice to corporation regarding failure to file annual statement with the secretary of state); DEL. CODE ANN. tit. 8, § 136(a) (1991) (requiring a registered agent to give notice of resignation to corporation at least thirty days prior to filing certificate of resignation).

333. See, e.g., CAL. CORP. CODE §§ 2205(b), 2206(a) (West 1990) (after sixty days if no annual statement filed with the secretary of state); DEL. CODE ANN. tit. 8, § 136(c) (1991) (if new registered agent not designated within sixty days after the filing of the certificate of resignation). See generally MODEL BUSINESS CORP. ACT ANN. § 14.21 annot. (Supp. 1993).

334. See, e.g., CAL. CORP. CODE §§ 2205(a), (b), 2206(a) (West 1990) (secretary of state required to give notice to Franchise Tax Board and to the corporation); N.Y. TAX LAW § 203-b(3) (McKinney 1986) (requiring filing of proclamation by secretary of state containing list of corporations and requiring publication of a copy of the proclamation in the state bulletin).

335. REV. MODEL BUSINESS CORP. ACT § 15.32(a) (1984).

revocation of the certificate of authority.<sup>336</sup> The court may summarily order the secretary of state to reinstate the certificate of authority or may take such other action as it deems appropriate.<sup>337</sup> The final action of the court may be appealed in the same manner as in other civil cases.<sup>338</sup> Earlier versions of the Model Business Corporations Act also permit a foreign corporation to appeal the revocation of its certificate of authority.<sup>339</sup>

The Revised Model Act does not provide a procedure by which a foreign corporation whose certificate of authority has been administratively revoked may be reinstated after correcting the grounds for the revocation. There is no reason for denying a foreign corporation whose certificate of authority is revoked for failure to pay franchise taxes, to deliver an annual report to the secretary of state, or to maintain a statutory agent, the same opportunity as a domestic corporation<sup>340</sup> to correct the failure and seek reinstatement. Several states which have adopted the Revised Model Act have corrected this oversight and permit reinstatement of a foreign corporation after revocation of its certificate of authority.<sup>341</sup>

In California, a foreign corporation which forfeits its authority to transact business in the state for failure to file its annual report with the secretary of state may generally be relieved of the forfeiture by filing the report.<sup>342</sup> Similarly, a corporation whose authority is forfeited by the Franchise Tax Board may be

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336. *Id.* Copies of the corporation's certificate of authority and the secretary of state's certificate of revocation must be attached to the petition to reinstate the certificate of authority. *Id.*

337. *Id.* § 15.32(b). States adopting the Revised Model Act "should specify who has the burden of proof on appeal and the standard for judicial review." MODEL BUSINESS CORP. ACT ANN. § 15.32 cmt. (Supp. 1993).

338. REV. MODEL BUSINESS CORP. ACT § 15.32(c) (1984).

339. *See, e.g.*, MODEL BUSINESS CORP. ACT § 140 (1969) (no time limit set out; de novo trial).

340. *See supra* part VI.C.

341. *See, e.g.*, TENN. CODE ANN. § 48-25-303 (Supp. 1992) (allowing reinstatement if within two years of effective date of revocation, reinstatement relates back to date of administrative revocation); VA. CODE ANN. § 13.1-769.1 (Michie 1989) (allowing re-entry within five years after revocation).

342. CAL. CORP. CODE §§ 2205(d), 2206(a) (West 1990).

relieved upon written application to the Board and payment of all taxes, deficiencies, interest, and penalties which are due.<sup>343</sup>

In New York, a foreign corporation which has its authority to transact business in the state annulled by the secretary of state for failure to file annual franchise tax reports with the state tax commission or for delinquency in the payment of taxes, may be reinstated by filing a certificate from the tax commission with the department of state.<sup>344</sup> In addition, in New York the name of a corporation whose authority to transact business in the state is annulled is reserved for a period of three months after the proclamation of annulment by the secretary of state.<sup>345</sup>

## VII. CONCLUSION

A business lawyer must be familiar with the administrative aspects of state corporation law. Compliance with the filing, annual report, and office and agent requirements helps avoid unpleasant surprises for both the attorney and the client.

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343. CAL. REV. & TAX. CODE § 23305 (West 1992). The revival is effective upon the issuance of a certificate of revivor by the Franchise Tax Board. *Id.*

344. N.Y. TAX LAW § 203-b(7) (McKinney Supp. 1993).

345. *Id.* § 203-b(6) (1986).

