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BUSINESS ORGANIZATIONS LAW

Third Edition

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shares.¹ Such shares are treated as still having the status of "issued" shares for purposes of resale, although they no longer have dividend or voting rights.² It has generally been held that the corporation may reissue and sell these treasury shares for less than their par value.³ Treasury shares are not truly assets to be sold, but merely represent the power to reissue the shares, which is distinguished from the power to create shares by subscription upon original issue.⁴ The reason given for this distinction is that the corporation has already received a capital contribution for treasury shares and has thereby created for the corporation a stated capital "liability" with respect to the shares so issued, which was not eliminated upon the corporation's reacquisition of the shares. Upon their subsequent reissue, these shares do not increase the corporation's stated capital.⁵

§ 16.10 No-Par Shares; Advantages, Issue Price

New York¹ initiated the movement to authorize the use of shares without par value. No-par shares have since been authorized in nearly every state.² The comparative advantages of using no-par and par value shares should be weighed in drafting the stock clauses of a corporation's charter.

The number of no-par shares that may be issued must be specified in the articles of incorporation, or the shares will be void.³ The great feature of no-par shares is price flexibility in that they require no fixed minimum capital contribution, although the same kind of quality of consideration is required as for par value shares. No-par shares may be issued from time to time at different prices, yet the subscribers and holders of the same class and series of shares will be entitled to participate equally share-for-share in the distribution of dividends and

§ 16.9

1. The 1980 revisions to the Model Act abolish treasury shares. Former MBCA § 6 (1980); MBCA § 6.31 (1984).

2. Former MBCA § 2(h) (1969). *See id.* § 18, which provides that treasury shares may be issued at a price fixed by the board without regard to par.

3. *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

4. *See Borg v. International Silver Co.*, 11 F.2d 147 (2d Cir. 1925); *Americar, Inc. v. Crowley*, 282 So.2d 674 (Fla. Ct. App. 1973) (Carroll, J. dissenting).

5. George S. Hills, *Stated Capital and Treasury Shares*, 57 J. Acct. 202, 214 (1934).

§ 16.10

1. N.Y. Stock Corp. Law § 12 (1912). *See also* Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of*

William W. Cook's *Publication on Corporations*, 93 Mich. L. Rev. 1724, n.48 (1995) (commenting that an analysis of the early no-par statutes is provided in Cornelius W. Wickersham, *A Treatise on Stock Without Par Value of Ordinary Business Corporations* (1927)).

2. *E.g.*, Del. Code Ann., tit. 8, § 153 (2009).

3. *Triplex Shoe Co. v. Hutchins*, 152 A. 342 (Del. 1930). *See also* *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991) ("stock issued without authority of law is void and a nullity"). *See* C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 Bus. Law. 1109 (2008) (speculating that *Triplex* may have been changed by subsequent enactment in Delaware of UCC provisions that can be interpreted to provide that filing amendment to certificate after shares were issued "cures" the failure of shares to have been duly authorized when initially issued).